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No. 86

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GEORGE GEBRAYEL
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SEPTEMBER 9, 1986

QUESTIONS PRESENTED

1. Where Congress has emphatically spoken that should the Secretary of the Treasury prescribe a report for domestic currency transactions such report shall be signed **both by the financial institution in question and one or more of the participants to the transactions**, may the Secretary of Treasury unilaterally prepare his own form where only the financial institutions can sign and may petitioner be found guilty of failing to file such form?

2. As applied to petitioner, 31 U.S.C. § 5322(b) is unconstitutionally vague and therefore void; or alternatively, should not apply to petitioner.

3. Is it denial of petitioner's due process for the government to object to the introduction of a prior inconsistent statement voluntarily given to petitioner's counsel by the government's star

witness?

4. It is an abuse of discretion by the trial court to deny an evidentiary hearing on newly discovered evidence requested by petitioner and the government, where the court assumed the truthfulness of petitioner's allegations, and where the star witness was allowed to withdraw the plea of guilty to the charge of conspiracy one year after the entering of such a plea leaving petitioner the only conspirator?

5. It is prosecutorial misconduct and a deprivation of petitioner's right to a fair trial for the government to refer to petitioner's conduct as laundering money when government admitted at sentencing that petitioner was never engaged in such conduct nor was he suspected of any such conduct?

6. Was petitioner entitled to a jury instruction on entrapment since the

indictment was a result of a sting operation and petitioner had no prior criminal record?

7. (a) Where evidence seized pursuant to an illegally obtained search warrant, later acknowledged to be illegally obtained and not in good faith, evidence subsquently used against petitioner, was it abuse of discretion by the trial court (1) to deny an evidentiary hearing prior to trial? (2) To postpone such a hearing until after trial? (3) Fail to conduct a hearing and allow all of the evidence illegally seized to be used against petitioner during the course of the trial resulting in violation of petitioner's constitutional right under the Fourth Amendment?

(b) Was it incumbent upon the trial court to search the record for such evidence or may it summarily deny the motion to suppress?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

GEORGE GEBRAYEL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

George Gebrayel petitions this court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit that "entered against him."

OPINIONS BELOW

In July 1984, the district court entered a judgment of conviction upon a jury verdict, denied petitioner's motion of aquittal or a new trial, and sentenced petitioner to a term of imprisonment. To the best of petitioner's belief, that decision was not recorded. In April of 1986, the Ninth Circuit in a memorandum

opinion, not for publication, denied petitioner's request for reversal, or in the alternative, for a new trial. While the appeal was pending in the Ninth Circuit Court of Appeal, petitioner filed a motion for evidentiary hearing on newly discovered evidence. The government joined in that motion. The district court, Judge Alfredo Marquez, sitting by designation, denied the motion. A timely appeal was filed with the Ninth Circuit Court of Appeals on that motion. The two cases were consolidated. The Ninth Circuit Court in this memorandum opinion denied petitioner's motion for a new trial.

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment that the United States Court of Appeals entered on April 30, 1986. The petition for rehearing and suggestion for

rehearing en banc were denied on July 9, 1986. (Appendix 1). The present petition was filed on September 9, 1986. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first two questions presented concern the proper Construction of Public Law 91-508 later codified as Title 31 of U.S.C. § 1051 et seq. The third question deals with the rule of Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), and whether petitioner may invoke such rule against the government. The fourth question deals with the discretion of the district court, the scope of such discretion and whether it allows the trial judge to deny an evidentiary hearing on newly discovered evidence where such hearing is requested by the government

and petitioner. The fifth question addresses petitioner's right to due process of law under the Fifth Amendment to the Constitution and whether prosecutorial misconduct was of such outrageous nature as to have denied such right to petitioner. The sixth question addresses the issue of the right of petitioner to an instruction on entrapment and whether its denial of due process of law to be denied such instructions. The seventh question raises the issue of the trial court's discretion in summarily denying a motion to suppress illegally obtained evidence prior to and after trial, when the government admitted by implication that such evidence was illegally obtained and in bad faith.

STATEMENT OF THE CASE

Petitioner (originally from Lebanon and without prior bank managerial exper-

ience, where banking transactions are shrouded in secrecy more so than Switzerland) was formerly a Vice Chairman of the Board of Directors of the newly opened Pan American International Bank in Las Vegas, Nevada. The bank was the subject of a federal "sting" investigation in which an undercover agent brought large sums of cash to the bank insisting that the money be handled with secrecy. The "sting" culminated in the indictment of the bank and its officers, including the Chairman of the Board of Directors, Rafael Acosta, petitioner and the bank's head cashier, Richard Rodriguez.

In an ex parte confidential pre-trial memorandum submitted to the trial judge (A-32) (which was ultimately released to the defense) (CR 189), the prosecutor made his pitch about "laundering drug money."

In November, 1983, co-conspirator Richard Rodriguez entered a plea of guilty to the charge of conspiracy with the other charges being dropped against him. In January 1984, the Bank entered a plea of guilty to fail to file Currency Transaction Reports (CTR). The Bank was fined $125,000; $95,000 of which was suspended and the $30,000 to be paid at the rate of $6,000 per year for five years.

At a jury trial, defendant Acosta was acquitted. Petitioner was found guilty of conspiracy [18 U.S.C. § 371]; failure to file Currency Transaction Reports ("CTR") [31 U.S.C. §§ 5313, 5322; 31 CFR §§ 103.22 and 103.25]; and aiding and abetting on the filing of a false currency transaction report [18 U.S.C. §§ 2, 1001] (CR 205).

On October 5, 1984, petitioner was sentenced to two years imprisonment on

the conspiracy count and a five year probation on the remaining counts (ER I, IX); petitioner filed a timely notice of appeal to the Ninth Circuit from his conviction the same day (84-1296).

On September 19, 1984, co-conspirator Rodriguez moved the court to set aside his judgment of conviction of conspiracy and to withdraw his plea of guilty (CR 222), pursuant to a suggestion to that effect from the trial prosecutor, Assistant United States Attorney, Donald J. Campbell. (A-42) Mr. Campbell represented that during an interview with Rodriguez two days before the trial, Campbell first learned that Rodriguez did not have a history of corrupt reporting abuses during his earlier work at Pioneer Citizens Bank. Thus, Rodriguez' conviction as a co-conspirator was sought to be set aside for what prosecutor Campbell termed an "injustice." After a hearing

on October 18, 1984, (CR 234), the court, on October 22, 1984, granted Rodriguez' motion, set aside Rodriguez' judgment of conviction and ordered the withdrawal of the plea of guilty to the conspiracy count. The court further ordered opposing counsel to meet and discuss the disposition of the case and to report to the court a proposal for intended disposition. (CR 234). The Rodriguez matter has lain dormant since his conviction was vacated. Petitioner, through one of his counsels, first learned of the Rodriguez plea withdrawal in the early part of November 1984.

These circumstances regarding co-conspirator Rodriguez were the basis of petitioner's motion for a new trial on the ground of newly discovered evidence. The government joined in such a motion. The Honorable Judge Alfredo Marquez never set an evidentiary hearing on the issues.

Relying on United States v. Bagley, U.S. 1985, 105 Sup. Ct. 3375, the trial court summarily denied petitioner's motion for a new trial on August 14, 1985 - while assuming petitioner's allegations to be true. Petitioner timely appealed (85-1277) and both cases were consolidated.

On April 30, 1986, the Ninth Circuit Court of Appeal affirmed petitioner's conviction on all counts. (A-3) On May 14, 1986, petitioner filed with the Circuit Court of Appeals a motion for a rehearing and a suggestion of rehearing en banc. Such motion was denied on July 9, 1986. (A-1) The mandate issued on July 18, 1986. On August 12, 1986, petitioner filed the motion for stay of mandate pending application for review on certiorari. The motion was received late and the mandate had issued. The motion

to recall the mandate was filed on August 20, 1986.

STATEMENT OF MATERIAL FACTS

Prior to opening for business on July 19, 1982, the Pan American International Bank ("PAIB") was targeted by the government for a "sting" operation. Accordingly, the government sought to introduce an undercover agent from the criminal investigation division of the Internal Revenue Service, to the management of the bank. The agent, Michael Berry, represented himself to be a mexican Major with the Department of Police and Traffic for the Federal District of Mexico. He had been given credentials by the Mexico City Police Department as Major Miguel Holguin. Accompanied by German Ferriola, another alleged mexican police official, he came to the bank on September 17, 1982, two months after its opening.

Ferriola bemoaned the fact that a lot of mexican officials had been exposed by the press for trying to get money out of Mexico and into the United States, at a time when severe economic and financial conditions were besetting Mexico. There were no U.S. dollars to be had at that time. All deposits by U.S. citizens in Mexico, which were deposited in dollars, were allowed to be withdrawn in pesos, at a very devaluated rate of exchange. Acosta represented that he could help such persons move money to the United States with complete confidentiality. In addition to being chairman of the board of the bank, Acosta was Vice President of the Desert Inn Hotel and Country Club in Las Vegas, Nevada, in charge of Latin American Affairs. He issued credit to mexican and other latin american gamblers and, subsequently, went overseas to collect these markers. Acosta moved

between $18 to $22 million dollars a year from these gamblers to the Desert Inn Hotel in Las Vegas, Nevada. At Acosta's suggestion, both men filled out signature cards using aliases which Acosta said he would hold in a special cabinet for handling accounts of that nature.

Afterwards, Acosta introduced both men to petitioner and showed petitioner the signature cards which these men were to use in the future and would deal in confidence with petitioner. Before leaving the bank, the agent displayed to Acosta the agent's Nevada driver's license and Mexico City police credentials.

One month later (November 14, 1982), the agent returned to the bank wearing (for the first time) a tape recording device. The conversation was strictly between the agent and Acosta. Petitioner at one time, entered the room briefly, spoke two words with Acosta and left.

On December 22, 1982, the agent (again equipped to tape record) brought $70,000.00 in cash to the bank. Petitioner asked if the agent wanted to open a checking account, savings account or a certificate of deposit. The agent did not state that he wanted to make a deposit; instead, he said he had $70,000.00 cash with him. The agent wanted to talk with petitioner in his office or in the conference room and petitioner called Rodriguez to join them. Petitioner cautioned the agent that a deposit of the entire amount would have to be reported. Petitioner then discussed hypothetical procedures to access the money; such as, $9,999.00 at a time. At that point, Acosta entered the room and directed that the entire $70,000.00 could be accepted, and that the agent would sign a paper reporting the deposit, but not with his real name because the agent (a mexican

national) did not have to pay taxes. Thereupon, Rodriguez produced a reporting form and directed the agent to fill it out and leave it at the bank but that it would not be mailed in. Rodriguez proposed that the account be put in a different name and the agent requested to use the card he signed "Manuel Orosco." Petitioner wanted to be assured that the agent would sign the declaration that: "This particular person is not a U.S. citizen and has got no social security number" to which the agent agreed. (Exhibit 3A, p. 6) Rodriguez returned to report that he could not find the earlier Orosco signature card and petitioner instructed Rodriguez to have him sign a declaration that he is not a U.S. citizen. Petitioner assured the agent that there would be no charge for accessing the money unless the transactions became so frequent as to involve a lot of hand-

ling and paperwork. Acosta verified that the agent had signed the declaration of alienage. Acosta insisted that the amount be handled in a lump sum. Petitioner insisted that a deposit of over $10,000.00 had to be reported on the IRS form, but Acosta took charge and insisted that he had more experience in this matter than petitioner. Acosta stated that these were his people and he knew how to handle it his way. Petitioner informed the agent that that was the first time he had worked in a bank. His banking experience was limited to being a director and organizer of the bank. The agent indicated his worry about the conversation between Acosta and petitioner by remarking to Rodriguez what amounted to that these people did not know what they were doing. Rodriguez replied that he was the banking expert and that he had seven years of banking experience.

On December 29, 1982, the agent brought an additional $90,000.00 to the bank. On January 5, 1983, the agent brought an additional $135,000.00 to the bank. On January 6, 1983, the agent withdrew $100,000.00 cash from the bank. On January 27, 1983, Rodriguez, at the request of the agent, arranged a wire transfer of $180,000.00 from the bank through Crocker National Bank in San Francisco to the People National Bank in Seattle, Washington. The other $15,000.00 was transferred to another account in the bank previously opened under the name Miguel Hogluin. While the money was at the bank, it was put in a repurchase agreement under the name of Jose Garcia. As such, it was handled in exactly the same fashion as all other repurchase agreements that other customers had with the bank. Interest was regularly credited, although the interest

was never claimed by the agent when he terminated his relationship with the bank. To the best of petitioner's knowledge, the interest was still in that account.

The use of the repurchase agreement ("Repo") is very significant because a supervisor with the Federal Deposit Insurance Corporation ("FDIC") testified at trial that a repurchase agreement is not insured by the FDIC. It is a private deal between a bank and its customer, where a customer purchases a portion of the bank's security portfolio. In case of a bank failure, the customer looks to the bank's security portfolio for the repayment and not to the FDIC.

Benjamin Fernandez, an independent consultant who helped petitioner and Acosta in the organization of the bank, testified that in December, 1982, he was contacted by Acosta. Fernandez advised

him on the use of repurchase agreements, including expressing the opinion that requirements for reporting currency transactions, had no applications to repurchase agreements; that such requirement related only to deposits insured by the FDIC. (RT 840).

No where in any of the tape recorded conversations, did the agent indicate that the source of the money was illegal. Nor did petitioner or anyone else believe that the source of the money was questionable. In fact, at each and every conversation where Acosta and agent were present, the conversation centered on the rate of exchange of pesos to dollars in Mexico. The money was brought in 5, 10 and 20 dollar bills, to further indicate the difficulty of obtaining large bills at a time when Mexico was in financial turmoil. However, all press releases and all statements opening and closing during

trial, referred to laundering of drug money; not to mention the references made to laundering drug money in that confidential ex parte memorandum to the trial judge before the beginning of the trial.

REASONS WHY REVIEW SHOULD BE GRANTED

Hundreds of sting operations have been conducted by the government in the last few years. Petitioner believes that aside from the fact that these sting operations are misguided, when it comes to the Currency Transaction Reporting Act the circuit Courts of Appeal have constantly misinterpreted the statute. These sting operations have not netted the government any criminal activity but have managed to snare innocent people. The circuits seem to differ on the interpretation of the statute. In fact, there seems to be a conflict in the Ninth Circuit alone as to what the statute

really says. Petitioner believes that this is a case of first impression to the Supreme Court. Aside from the violation of petitioner's constitutional rights, the importance of this statute will have a severe impact on the way americans and foreigners conduct business in the United States. Petitioner maintains that the Secretary of Treasury has usurped Congress' power to enact statutes and rewrote the law as he saw fit. Such resurping of power goes to the heart of the Constitution which holds that all three branches of government shall be independent.

I. The First Question Presented

Congress enacted Public Law 91-508 on October 26, 1970. Sections 221 and 222 of Title II of that law are the pertinent portions of the first question presented.

(84 Stat. 1122.)[1] When later codified as 31 U.S.C. §§ 1081 and 1082, they were verbatim transcript of §§ 221 and 222 of Public Law 91-508. When Public Law 97-258 was enacted on September 13, 1982

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§ 221. **Reports of currency transactions required**

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. **Persons required to file reports**

The report of any transaction required to be reported under this chapter **shall be signed** or otherwise made **both** by the **domestic financial institution** involved **and** by **one or more of the other parties** thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the **report shall identify the person or persons on whose behalf the transaction is entered into**, and **shall be made by the individuals acting as agents or bailees with respect thereto**. (Emphasis added.)

(96 Stat. 996) the pertinent sections and § 1083 of the previous U.S.C. code became 31 U.S.C. 5313.[2] In enacting Public Law 97-258, Congress was careful to state that the law was more a revision of language than of substance. The statute was enacted:

"To restate the laws related to money and finance in one comprehensive title, it is necessary to make changes in language. Some of these changes are neces-

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§ 5313. **Reports on domestic coins and currency transactions**

(a) When a domestic financial institution is involved in a transaction or the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, **the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction** at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made. (Emphasis added.)

sary to attain uniformity within the title. Others are necessary as a result of consolidating related provisions of law and to conform to common contemporary usage. In making changes in the language, precautions have been taken against making substantive changes in the law." (Emphasis added.) (U.S. Code Congressional and Administrative News, Vol. 3, 97th Congress, Second Session, p. 1896.) As further proof that no substantive changes were made nor intended, House Report 97-651 states:

"As in other codification undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions or other interpretations. This

fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification of law, however, the courts uphold the contrary presumption: the law is intended to remain **substantively** unchanged." (Emphasis added.) (U. S. Code Congressional and Administrative News, Vol. 3, 97th Congress, 2nd Session, p. 1897.)(1982)

Public Law 91-508, § 222, makes it mandatory, that should a report be prescribed by the Secretary of the Treasury, it shall be **signed** or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein. As further indication of Congress' intent that the report, should one be prescribed by the Secretary of the Treasury, shall be

signed by the domestic financial institution and by at least one participant to the transaction is the legislative history of PL 91-508:

"These reports must be signed **both** by the domestic financial institution involved and by one or more of the other parties thereto. (U.S. Code Congressional and Administrative News, Vol. 2, p. 4396, 91st Cong., 2nd Sess. 1970). (Emphasis added.)

IN THE SECTION-BY-SECTION EXPLANATION OF PURPOSES AND LEGAL EFFECT OF THE BILL (U.S. Code Congressional and Administrative News, Vol. 2, p. 4399), Congress gave its reasons for requiring the domestic financial institution and at least one participant in the transaction to sign such a report. "The bill requires that reports be filed by **both** the financial institution involved and by one or more of the other parties

to or participants in the transaction, as the Secretary may require. The purpose of this is two fold. **First, it permits the prosecution of a person who supplies false information for such a report and signs it. Secondly, it relieves the institution of any pressure the Secretary of the Treasury might otherwise be inclinded to exert to require it to submit reports of this type without notifying the customer.** The latter procedure raises serious questions with respect to the fiduciary duty of financial institutions to their customers, not to mention the right of privacy or simple fairness." (U.S. Code Congressional and Administrative News, Vol. 2, p. 4407, 91st Cong., 2nd Sess. 1970.) (Emphasis added.)

The Secretary of the Treasury has never prescribed a form that can be signed by both parties. The only form

that is available is IRS form 4789. This reportiong form only requires the financial institution to sign it. In U.S. v. Reinis, 794 F.2d 506, (July 1986) the Ninth Circuit held that the currency transaction reporting form was not effective as a regulation under the reporting act, where such form was never promulgated pursuant to the rule making requirements of the Administrative Procedure Act. 31 U.S.C. § 5313(a); 5 U.S.C. § 553. Petitioner alleged in his appeal that no such form exists. However, a different panel of the Ninth Circuit Court found that he violated form 4789 of the Internal Revenue Service Code. (A-25).

If indeed such form has never been prescribed, nor is the form available the one Congress has intended, then petitioner cannot be guilty of failing to file such a report nor of filing a

false one; and consequently could not be guilty of a conspiracy to fail to file one.

This aspect of petitioner's motion for acquittal was a subject of considerable debate at the hearing on the motion (RT sentencing, p. 3-5 et seq). However, the judge ultimately ruled the issue against petitioner without expressing any reason therefore (RT sentencing, p. 38).

On July 9, 1986, petitioner's motion for rehearing and suggestion for rehearing en banc was denied. One of the panelists, Circuit Judge Schroeder of the Ninth Circuit, had previously indicated while affirming petitioner's conviction, that petitioner points to no authority for his proposition indicating that a CTR form has never been designated. (A-25). Circuit Judge Schroeder, on July 13, 1986, in U.S. v.

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Reinis, supra, held along with the other panelists, Circuit Judges Hall and Hardy, that indeed the Secretary of the Treasury never promulgated the reporting act pursuant to the rule making requirements of the Administrative Procedure Act. Since Circuit Judge Schroeder affirmed petitioner's conviction and did not file a dissenting opinion in Reinis, petitioner finds this stand inconsistant in the same circuit and the same circuit judge. Such inconsistancy requires the Supreme Court's interpretation.

The Supreme Court will note the discrepancy in language between the Public Law as enacted and the subsequent codification. Petitioner maintains that the subsequent codification is not as precise as the Public Law initially enacted and viewed by Congress.

II. The Second Question Presented

Petitioner takes issue with the subsequent codification of Public Law 91-508 § 210.[3] Section 210 subsequently became 31 U.S.C. § 1059, without any changes. In its later codifications in 1982, § 210 became 31 U.S.C. 5322(b).[4]

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[3] § 210. **Additional criminal penalty in certain cases.**

Whoever willfully violates any provisions of this title where the violation is --

(1) committed in furtherance of the commission of any other violation of Federal Law, or

(2) committed as **part of a pattern of illegal activity** involving transactions exceeding $100,000 in any twelve-month period, shall be fined not more than $500,000 or imprisoned not more than five years, or both. (Empahsis added.)

[4] § 5322. **Criminal penalties**

. . .

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined no more than $500,000, imprisoned for not more than 5 years, or both.

The court will note the difference in language between the two sections. The word "regulation" appears where it was not in the initial statute. "While violating another law of the United States" is a substantive change from "Committed in furtherance of the commission of any other violation of federal law." In § 210(2), transactions had to exceed $100,000.00 in any twelve month period. In § 5322 the word exceeds has been replaced by more than.

The indictment charges that petitioner's failure to file Currency Transaction Reports was committed as part of a pattern of illegal activity involving transactions exceeding $100,000.00 in any twelve month period. Therefore, by implication, Petitioner was not found to be in violation of § 210(1) i.e. petitioner's conduct was "not committed in

furtherance of the commission of any other violation of Federal Law."

If Petitioner is not guilty of violating another Federal Law under § 210(1), then how can his conduct be a part of pattern illegal activity under § 210(2), in light of the fact that Petitioner was not charged with violating any other state law either?

PL 91-508 § 209 provides for a criminal penalty for "whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Petitioner maintains that, in order to trigger the enhanced penalty under § 210, the seriousness of the crime must be of such magnitude as to deserve a 500,000 percent increase. Petitioner maintains that the language of this statute, even

in the original, is vague. It is subject to multiple interpretations. In U.S. v. Emmons, 410 U.S. 396 (1973), the Court held that criminal laws are to be strictly construed. In Kolender v. Lawson, 461 U.S. 352 (1983), the Supreme Court stated that a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Thus the provisions of § 210 are void for vagueness. In U.S. v. Missouri Pacific Railroad, 278 U.S. 269 (1929), the plain meaning rule found its origin. The court held that where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the

final expression of the meaning intended.

Not charging petitioner, under § 210(1) but charging him under § 210(2) is absurd. If petitioner is involved in a pattern of illegal activity, then by implication he is violating at least another law of the United States, if not several more. However, the indictment does not charge that he violated any other federal law but strictly that it was part of a pattern of illegal activity. Not only the government failed to explain what pattern of illegal activity was, it failed to prove that petitioner was involved in any other illegal activity.

The statute is also silent as to what constitutes a pattern of illegal activity. If petitioner's failure to file Currency Transaction Reports or filing a false one constitutes the **part** portion,

such as in part of a pattern, then where is the pattern of the illegal activity. A careful review of the legislative history of this section does not shed any more light on what constitutes the pattern of illegal activity. In the **SECTION-BY-SECTION EXPLANATION OF PURPOSES AND LEGAL EFFECT OF THE BILL,** (U.S. Code Congressional and Administrative News, Vol. 2, p. 4406 (91st Cong. 2nd Sess. 1970), Congress indicated that serious violations under this title may involve very large sums of money, and fines of as much as $10,000.00 or more might be shrugged off as a mere cost of doing business. To have any real deterent effect, the potential fine must be large enough to have some economic impact on potential violators.

Under domestic currency, a hint is given as to what may constitute pattern

of illegal activity. (U.S. Code Congressional and Administrative News, Vol. 2, p. 4396 (91st Cong. 2nd Sess. 1970). The report finds that money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials. Petitioner does not contend that proceeds of a lottery racket or bribery of public officials is the only way or pattern of illegal activity could occur. However, the only instance that petitioner can recollect where this particular type of language is used is with the RICO statute.

On February 7, 1985, the First National Bank of Boston was fined $500,000.00 in federal court after pleading guilty to failing to report cash transfers of **1.2 billion dollars.** The failure to report included 998 deposits

and 170 withdrawals a total of 1,168 transactions. (New York Times, Feb. 8, 1985, p. 1, col. 5.) The average size of each transaction amounted to $1,027,397.26, and the penalty amounted to $428.08 per transaction.

The Treasury Department levied and Bank of America agreed to pay the record 4.75 million dollars in **civil** penalties for failing to report cash deposits or transfers of more than $10,000.00 between 1980 and 1985. The Treasury has imposed **similar** (civil) penalties on twelve other banks in the past eleven months. The government, however, did not accuse Bank of American of dealing with organized crime. (Time Magazine, Feb. 3, 1986, p. 58.) (Emphasis added.)

Recently, Crocker National Bank of California, was fined 2.25 million dollars in **civil** penalties for failing to

report approximately 7,900 currency transactions. More than **4.5 billion** was involved in these transactions. The violation of each transaction by Crocker National Bank was punished by a civil penalty of approximately $225.00, i.e., one fourth of what Congress has required under § 207of PL 91-508.

If none of these thousands of transactions by all the aforementioned institutions constitute a part of a pattern of illegal activity as defined by § 210(2), then how can four violations by petitioner constitute a part of a pattern of illegal activity meriting the enhancement penalty of a $500,000.00 fine. The government contends that two violations in any twelve month period of the currency transaction reporting Act totalling more than $100,000.00 could trigger a $500,000.00 penalty. So, the deposit of

a $50,001.00 into an account on a Monday and the withdrawal of $50,000.00 from that same account and money on Tuesday, both transactions unreported, would trigger a $500,000.00 penalty according to the government. The government does not explain how it intends to collect the $500,000.00 fine from someone who only has $50,000.00.

On the other hand, one single transaction, regardless how illegal or how the money was obtained, in the billions of dollars, unreported, would only trigger a $1,000.00 fine. The statute speaks of transactions in the plural. Therefore, the unreported transactions must be more than one. Should, therefore, someone decide to transfer one time only, 1 billion dollars or more, he could legitimately escape any penalty except for $1,000.00. However, should on the other

hand, a person structure two deposits to exceed $100,000.00 in two separate transactions as discussed earlier, he would be fined $500,000.00. Such cannot be the intent of the law, for the first individual would have escaped total liability, the second would have been subjected to cruel and unusual punishment, in contravention of the Constitution of the United States.

Government, itself, has taken contradicting views of the construction of the enhancement provision. In United States v. Dickinson, 706 F.2d 88 (2nd Cir. 1983), there was only one reporting violation as to leaving the country with $860,000, but the prosecution argued for penalty enhancement on the basis the defendant's activities were related to other arguably illegal conduct. The court rejected the argument but said, in

apology, and in violation of the rule of strict construction:

> . . . We believe the latter interpretation is correct, although we dispense with any pretense that the legislative history and other relevant criteria disclose a clearly marked trial.

In U.S. Reinis, supra, the court held that criminal penalties for failure to report currency transactions under the Reporting Act can attach only upon a violation of regulations promulgated by the Secretary of the Treasury. To violate the regulations, the regulations must prescribe to the will of Congress. In this instance, petitioner should not be found guilty of the enhanced penalty where the Secretary of the Treasury has failed to conform the report to the wishes of Congress.

In U.S. v. Booky, 733 F.2d 1335 (9th Cir. 1984) the court correctly noted that the predecessor of § 5322(b), 31 U.S.C. § 1059, was worded somewhat differently and accepted defendant's argument that the language should control all the interpretation of § 5322(b). In Booky the defendant was charged with failure to file a report with the Secretary of Treasury and falsely reporting the same report in an earlier statement to custom agents. The court held that 18 U.S.C. § 1001 was a catch-all provision to where both the false statement and the failure to report merged into the false statement. Petitioner was charged by the government of failing to report a $135,000.00 cash brought to the bank on January 5, 1983. He was additionally charged with falsely reporting such amount to the government. Petitioner maintains that being charged for the same al-

leged crime twice is a violation of the Double Jeopardy Rule. In Booky, supra, the Ninth Circuit held that his violation of the False Statement Statute, 18 U.S.C. § 1001, may not be used to enhance his penalty under 31 U.S.C. § 5322(b). His sentence was vacated and remanded to the district court for resentencing under 31 U.S.C. § 5322(a), a misdemeanor. Petitioner prays for an equal interpretation of his conviction.

PL 91-508 § 207[5] provides for a $1,000 **Civil Penalty** for each willful violation of this title by any financial institution and any partner, **director,** officer or employee thereof.

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[5] § 207. **Civil penalty**

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, **director, officer or employee** thereof who willfully participates in the violation, a civil penalty not exceeding $1,000. (Emphasis added.)

At the time of the alleged offenses, petitioner was Vice Chairman of the Board of Directors in the Bank, i.e. a director. But instead of a total of $4,000 in civil penalties for four transactions, the government elected the most severe criminal penalty under § 210, a penalty reserved for someone engaged in other criminal activity in conjunction with the violation of the Currency Transaction Reporting Act, one who is directly benefitting from both activities.

It was not by sheer coincidence that Title II of PL 91-508 was structured the way it was. Section 201 deals with the name of the title.

By specifically enacting § 207 and distinguishing it from other sections, dealing with willful failure to file a report, where a proper one exists, Congress intended it to be the only penalty to be imposed on a director or officer of a finan-

cial institution or else the need for the section would be useless, cummulative and absurd.

Section 207's legislative history indicates that Congress intended that "the availability of relatively modest sanctions is of great importance in assuring compliance with regulations of the type contemplate flated by this bill." (U.S. Code Congressional and Administrative News, Vol. 2, p. 4405)(91st Cong., 2nd Session 1970).

Not only petitioner was not guilty of any prior violation of the reporting act, prior to the beginning of the "sting" operation on December 22, 1982, he was equally not guilty of any subsequent violations of the reporting act between the end of the operation on January 6, 1983 and the resulting indictment on July 6, 1983.

Petitioner therefore prays the Court for a similar interpretation of § 207.

III. The Third Question Presented

Although this issue was not brought up on appeal, petitioner prays the Court to permit him to present it since it involves a question of denial of due process. In Carlson v. Green, 446 U.S. 14 (1980), the Court held that nothing precludes this Court from hearing it.

On January 6, 1984, petitioner and his counsel, along with co-defendant Acosta and his counsel, took a statement from the third co-defendant, Richard Rodriguez in the presence of his counsel and a court reporter. The statement was freely and willingly given without duress or coercion. It was given approximatley 2 months after co-defendant Richard Rodriguez had entered a plea of guilty to the conspiracy count and had been granted probation for his cooperation by the government. Petitioner's counsel represented that the statement was for informational purposes only. Rodriguez's counsel

requested the statement not be used for impeachment purposes. Petitioner's attorney stipulated so. Petitioner believes that the statement given on that date was very candid In nature due to the fact that Rodriguez' attorney stated as a matter of accomodation, he would have his client answer any and all questions that petitioner and his attorney had or any other subsequent questions that would arise in the future. Petitioner believes Rodriguez was telling the truth at that time. The statement was exculpatory in nature and disproved petitioner's guilt. Rodriguez' recollection of the activity that led to the indictment was fair but he maintained that he didn't do anything wrong; and he still, and up to the time of the indictment, believed that Currency Transaction Reports need not have been filed on foreigners. The government requested a copy of the statement from Rodriguez' attorney, which copy was provided. The government, which

had maintained for one year, in the media, that the bank was involved in millions and millions of dollars of money laundering, found its case crumble under Rodriguez' statement. At trial, Rodriguez' testimony was diametrically opposed to the statement he had given on January 6, 1984, six months prior. On cross-examination, petitioner's counsel sought to refresh his memory as to the statement given which was inconsistent with the testimony in the courtroom on that date. The government acknowledged having a copy of Rodriguez' statement. (RT 571). The prosecutor objected to its introduction since it would have impeached his star witness. The court found that petitioner's counsel was obviously trying to impeach the witness. Neither the statement was allowed to be introduced into evidence nor was the witness allowed to be cross-examined on it for fear of impeachment. There was no ruling to that effect, however, the court

indicated its displeasure with the way petitioner's counsel was impeaching co-conspirator Rodriguez.

Petitioner maintains that it was prejudicial error for the trial court not to allow the cross-examination of Rodriguez on his own statement even if the effect would have been to impeach him. This error was of such constitutional magnitude that it deprived petitioner of the right to cross-examine his accuser. Moral and ethical considerations require a prosecutor to seek justice and not conviction. Furthermore, the government had no standing to object to the introduction of the statement or the cross-examination on it. In the first instance, the government was not a party to the statement. In the second, the prosecution should have brought it to the attention of the court on its own' since it would have negated petitioner's guilt and rendered the entire trial moot. In fact, the prosecution

was duty bound to present the statement and bring it to the attention of the court. Petitioner maintains that he should have been allowed to cross-examine Rodriguez on a prior inconsistent statement just as the government would have under Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971). In Harris, the Supreme Court held that the prior inconsistent statement prior to a Miranda warning, may not be used against a defendant in a court proceeding, except when the defendant takes the stand. At that time, the prior inconsistent statement may be used for purposes of impeachment if not obtained by duress or coercion. The court held that a Miranda warning should not be a fertile ground for perjury. Petitioner obtained Rodriguez' statement willingly, freely and in the presence of his counsel. Rodriguez' counsel stipulated that he would instruct his client to answer all questions truthfully including any subsequent ques-

tions petitioner may have. If these questions were answered truthfully, the stipulation that they would not be used for purposes of impeachment would be moot. The truth itself cannot be impeached.

Petitioner prays that the court reverses his conviction or, in the alternative, remand for a new trial where the statement can be used.

IV. The Fourth Question Presented

When Rodriguez was allowed to withdraw his plea of guilty subsequent to petitioner's trial, petitioner moved the court for a new trial since there was no one else left for him to conspire with. Armed with three affidavits, one of which sworn by Rodriguez' first attorney, Joseph Houston of Las Vegas, petitioner found that as early as January of 1984, Rodriguez' was boasting about his attorney going back into court after petitioner and Acosta's trial and withdrawing

his plea of guilty. In addition to the three affidavits, William Cavanaugh, a now retired probation officer who supervised the guilty plea of Rodriguez, the Bank and petitioner, indicated in a letter, written to Judge Marquez, that the circumstances surrounding the plea of guilty Rodriguez had entered, and the ones represented by the government for the withdrawal of his plea of guilty, were not all totally truthful. Mr. Cavanaugh, petitioner believes, also indicated to the Judge that the bank that had plead guilty to a failure to file a Currency Transaction Report and fined $125,000.00, was approached by the prosecutor after petitioner's trial and suggested it withdraw its plea of guilty. The letter was sealed by the trial judge and at the request of petitioner forwarded to the Ninth Circuit Court of Appeals for its consideration in his appeal. However, the opinion of the Circuit Court does not indicate whether it ever

reviewed this letter or looked at it. Representations made by petitioner in this instance regarding the letter are from conversations that he had has with Mr. Cavanaugh and has not personally seen the letter which he believes remains under seal.

While acting indignant and maintaining that no deal was cut with Rodriguez, the government nevertheless welcomed the evidentiary hearing on the motion for a new trial. However, in its reply brief to petitioner's brief re: denial of new trial, filed on December 3, 1985, the government changed its tune a bit by alleging that petitioner's counsel failed to ask the proper questions of Rodriguez. These questions would have been proper had petitioner or his counsel suspected a deal between Rodriguez and the government. However, except for Rodriguez, his attorney and the prosecutor, with the possibility of one or two IRS agents on the case, no one else knew of the deal to con-

vict petitioner while turning everybody else loose. Petitioner had no reason to suspect that a special deal was cut.

The district court denied an evidentiary hearing for a new trial while assuming the truthfulness of petitioner's allegations. (A-26).

It was therefore prejudicial error to petitioner to deny him a motion on a new trial, or at least an evidentiary hearing to that effect.

IV. The Fifth Question Presented

Petitioner was deprived of a fair trial by references to laundering of money made and repeated by the prosecution. The test is whether the improprieties in the prosecutor's opening statement and summation, viewed against the entire argument before the jury, deprived the defendant of a fair trial. United States v. Wilkinson, 754 F.2d 1427, 1435 (2nd Cir. 1985). The fair trial

is well defined in the United States v. Mandell, 746 F.2d 155, 159 (2nd Cir. 1984):

> "The Constitutional standard is fairness not perfection. It is nonetheless, and rightfully, a high standard, for the court in a criminal case deals with the life and liberty of an individual. See generally, Fay v. Noia, 372 U.S. 391, 83 Sup. Ct. 822, 9 L Ed. 2d 837 (1963). Thus, it matters not whether Mandell may have actually known of some unindicted practices. Absent proof at trial, the law is blind. Our laws require that a presumptively innocent citizen be proven guilty by his government in a trial of specific charges. . ."

The statement of fact described the prosecutor's references to money launder-

ing which were based on erroneous information from other government agents/ informants. (RT 9, 15).

The prosecutor's opening statement referred to "laundering" in numerous instances and objections were made (RT 9, 15) but not allowed by the trial judge. The final summation of the prosecutor's returned to the theme of "laundering money." (RT 979).

No objection was interposed this time, but in view of the fact that the prosecutor later **admitted** there was never any intelligence information or informant information that petitioner's had any connection with narcotics (RT sentencing, 40), this is plain error and repeated error originally objected to. This meets the standard of plain error under United States v. Young, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). The fundamental fairness of the trial was undermined and this

accounts for the fact that petitioner was convicted and Acosta was acquitted.

Nor did the fact that the prosecutor referred to petitioner in the closing argument as a foreigner help matters any.

VI. The Sixth Question Presented

The petitioner was entitled to have the jury consider his instruction on entrapment. United States v. Wellington, 754 F.2d 1457, 1463 (9th Cir. 1985) describes the standard for error or refusal to give jury instructions:

> When viewing the challenge to the jury instructions we consider the instructions as a whole. The district court was given instructions relating to any legitimate theory of defense that is supported by evidence. A perfectly formulated jury instructions will serve as a basis for overturning a con-

viction only upon a showing of abuse of discretion.

The foregoing statement of facts show this was an undercover operation in which an IRS agent and a mexican official working in cooperation with federal authorities and the IRS agent set out to achieve the incrimination, prosecution and conviction of petitioner, luring the petitioner with representations of large sums of money to be made accessible to the bank, and following through with the deposit of $295,000.00 (a sum equal to between 2 and 5% of the entire deposits of the bank) (RT 525). Petitioner was induced to assist in maintaining the secrecy of the currency transactions by the conduct of Agent Berry. Petitioner did not receive any personal benefit from the transactions, but was lured to participate in various manipulations out of a

concern for the development of the bank. Playing on inexperienced persons, the agent induced petitioner to engage in discussions of secret transactions and to accept the directions of Rafael Acosta, (who was also inexperienced in banking) regarding freedom from currency reporting requirements and the use of deposits by foreigners, and the use of repurchase agreements. Neither petitioner nor Acosta understood the requirements for reporting and Agent Berry played on their ignorance to insure them. This is clearly a case calling for an instruction on entrapment, petitioner's legitimate theory of defense and the trial judge, unaccountably, refused to give any instruction to the issue.

The proper instruction was requested (ER 11, CR 199, defendant's proposed jury instruction A, p. 2). The instruction was refused by the court (RT 866, 869),

and the petitioner recorded his objection thereto (RT 888). Although the court asserted that the instruction was not properly phrased, the court did not point to any deficiency therein. (RT 886, 888, 869).

The defense of entrapment precludes conviction when there is no evidence of defendant predisposition to commit a crime and where the criminal conduct was a product of creative activity of law enforcement officials; the burden was on the prosecution to show that petitioner was predisposed to commit the crime where the agent first approached the petitioner. United States v. Lasuita, 752 F.2d 249, 252 (9th Cir. 1984). The jury question exists as to whether or not petitioner was predisposed, and reversible error existed when the judge refused to instruct on entrapment. As shown by the admission of the prosecutor at the sen-

tencing that petitioner had no disposition to "launder drug money" the government had no evidence that petitioner was predisposed to commit a crime. Predisposition cannot be shown on the basis that petitioner committed the crime he was induced to commit. United States v. Parisi, 674 F.2d 126 (4th Cir. 1982); United States v. Deermore, 672 F.2d 738 (9th Cir. 1982).

VII. The Seventh Question Presented

Petitioner is aware that the Supreme Court does not normally decide issues not presented below. However, nothing precludes the court from doing so. Carlson v. Green, 446 U.S. 14 (1980). This particular question was presented in the district court but not on appeal. Petitioner begs the court's indulgence in allowing to present this question. At petitioner's arraignment the government

stated that this was an open case implying that all evidence pertinent to the trial would be turned over to the defense soon. However, almost one year after the indictment and the seizing of the evidence, nothing of any value had been turned over to the defense. It wasn't until two weeks before the trial which was held on June 26, 1984, that the government turned any evidence to the petitioner. It was at that time that defense realized that the government had used two (2) search warrants to search the bank's premises and petitioner's office. The first search warrant is not in contention and yielded practically nothing. It was obtained at about 4:34 p.m. on July 13, 1983. The second search warrant obtained at 11:59 p.m. of the same date yielded a tremendous amount of evidence. (A-52). That search warrant was obtained pursuant to an affidavit of

J. Thomas Hampton (an IRS agent with the criminal investigation division on the case). It was made in bad faith or in reckless disregard for the truth. In every material way, the affidavit of Agent Hampton is contradicted by the subsequently obtained statement of every person he allegedly relied on to obtain the search warrant. The affidavit was made on July 13, 1983. In it, Agent Hampton alleges that conversations with Richard Rodriguez and YVONNE SABLITCH were the basis of his affidavit to the search warrant. In fact, the conversation with Richard Rodriguez did not take place until July 19, 1983, six days after the sworn statement. In that statement, Rodriguez contradicts in every way the allegations made by agent Hampton to obtain the search warrant. The conversation that Hampton alleged he relied on with YVONNE SABLITCH on July 13 to obtain

the second search warrant did not occur until July 20, 1983, (seven days after the affidavit). In it YVONNE SABLITCH contradicts in every way the allegations of Agent Hampton. Petitioner moved to suppress the evidence on June 22, 1984, four days before trial and one week after obtaining the evidence from the government. (A-74) Relying on Franks v. Delaware, 438 U.S. 154, 98 Sup. Ct. Rptr. 2674 (1978), petitioner stated that where the false affidavit is made in bad faith or in reckless disregard of the truth, the warrant must be voided.

It is submitted that the attack that petitioner made upon the affidavit of Mr. Hampton, meets in every regard, the requirements established by the Supreme Court to warrant an evidentiary hearing. The district court, however, did not rule on the motion. On July 13, 1984, petitioner filed a motion for a new trial

after he had been found guilty of all the charges and renewed his motion to suppress the illegally obtained evidence. Petitioner pointed out, for the second time, the evidence seized by the government illegally. On October 5, 1984, the sentencing date of petitioner, summarily and without an evidentiary hearing, the district court denied all previously made motions from June 22, 1984 and those renewed on July 13, 1984.

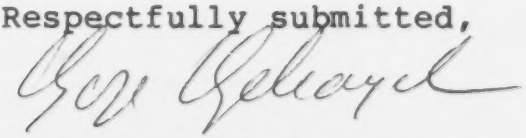
The prosecutor admitted the evidence obtained in the second search warrant was illegally seized by representing to the Court that none of it was used during the trial. Judge Marquez chose to believe the government's misrepesentations. Petitioner maintains that a cursory review of the trial record or the government's exhibits would have reached an opposite conclusion.

Petitioner contends that such an abuse of discretion by the district court was prejudicial and denied him the right to a fair trial. The evidence seized was a violation of petitioner's constitutional rights under the Fourth Amendment to the Constitution to be free of search and seizure of his personal papers.

CONCLUSION

Accordingly, petitioner prays the Supreme Court to summarily reverse the judgment of the court below. Should the court decline to summarily reverse, petitioner submits that constitutional considerations justify review in this case. Petitioner respectfully requests, in the alternative, that the court grant his petition.

Respectfully submitted,



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86-398

No. 86

Supreme Court, U.S.
FILED
SEP 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GEORGE GEBRAYEL
Petitioner.
v.
UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE GEBRAYEL PRO SE

Attorney for
George Gebrayel
Petitioner.

SEPTEMBER 9, 1986

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Filed July - 9 1986
Cathy A. Catterson,
clerk
U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	CA
Plaintiff-Appellee,	)	No. 84-1296
	)	85-1277
-vs-	)	
	)	ORDER
GEORGE GEBRAYEL,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: SCHROEDER, CANBY AND BOOCHEVER,
CIRCUIT JUDGES

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

Filed Apr 30 1986
Cathy A. Catterson, clerk
U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Nos. 84-1296, 85-1277
-vs-	)	DC No. CR LV 83-89-03 LDG
GEORGE GEBRAYEL, Defendant-Appellant.	)	**MEMORANDUM**

Appeal from the United States District Court for the District of Nevada Honorable Lloyd D. George, District Judge, presiding Argued and Submitted March 1, 1986 -- San Francisco, California

BEFORE: SCHROEDER, CANBY and BOOCHEVER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

In these consolidated appeals, George Gebrayel challenges this conviction for Currency Transaction Reporting Act (CTRA) violations and the district court's denial of his motion for a new trial. A jury found Gebrayel guilty on all of three counts charged, and he was sentenced to two years' imprisonment. We affirm.

BACKGROUND

Gebrayel's conviction resulted from an Internal Revenue Service undercover investigation of the Pan American International Bank in Las Vegas. The Bank was a new operation when the investigation began in 1982, and it specialized in assisting foreign nationals, especially those from Central and South America, with complex international transactions.[1]

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1 Information obtained from an apparent misinformed confidential source initially

Gebrayel was vice chairman of the Bank's board of directors; the evidence showed his direct involvement in several transactions that constituted CTRA violations.

IRS Special Agent Berry posed as a liaison officer for the Mexico City Police Department, and he approached the Bank for assistance with several large transactions that he wanted handled secretly. Initially, Berry dealt with Bank Chairman Rafael Acosta. Acosta asked Gebrayel to assist Berry, and Gebrayel enlisted the aid of Bank employee Richard Rodriguez. Rodriguez has been employed by another bank and was familiar with international transactions and CTRA requirements. Rodriguez and Gebrayel

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led the government to believe that the Bank was laundering illegal proceeds of drug transactions. The government's investigation, however, produced no evidence of any connection with narcotics activities.

worked together to establish bank accounts under false names on Berry's behalf. Gebrayel also arranged transactions with Berry's money, sometimes without Berry's knowledge, that included purchasing stock in the Bank and depositing money in interest-bearing accounts in other institutions in Gebrayel's name.

Several of the transactions Berry requested involved more than $10,000, thereby triggering the CTRA reporting requirements. See 31 U.S.C. § 5313; 31 C.F.R. § 103.22(a). Currency Transaction Reports (CTR's) were not filed for most of the Berry transactions, and, when they were, they included false statements.

Acosta, Gebrayal, (sic) Rodriguez and the Bank were indicted for conspiracy to violate CTRA, 18 U.S.C. § 371, failure to file timely CTR's on transactions aggregating to more than $100,000 in a 12-

month period, 18 U.S.C. §§ 5313, 5322(b); and aiding and abetting the filing of a false statement with the government, 18 U.S.C. §§ 2, 1001. The Bank pleaded guilty, and it was fined. Acosta was found not guilty on all charges by a jury. The same jury convicted Gebrayel.

Rodriguez initially pleaded guilty to the conspiracy charge under a plea bargain. He was to testify for the government, receive only probation, and have all other charges against him dropped. Shortly after he testified at Acosta's and Gebrayel's trial, Rodriguez asked to withdraw his guilty plea in a motion unopposed by the government. The court granted Rodriguez's motion after the government represented that further negotiations with Rodriguez, leading either to a misdemeanor plea or pretrial diversion, would result. Rodriguez was

not prosecuted further. Gebrayel contends that this scenario was prearranged, that the government kept this agreed arrangement from him and that he is entitled to a new trial because Rodriguez's testimony misstated the true arrangement. Assuming the truth of the alleged prearrangement, the district court denied Gebrayel a new trial.

DISCUSSION

I. Unconstitutional Vagueness

Gebrayel first argues that the penalty provision of CTRA, specifically 31 U.S.C. § 5322(b),[2] is unconstitutionally

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2 31 U.S.C. § 5322(b) provides:

A person wilfully violating this subchapter or a regulation prescribed under this subchapter . . . while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

vague. Because of his repeated CTRA violations, the government prosecuted Gebrayel for a felony under the part of Section 5322(b) that enhances penalties when CTRA violations are part of a pattern of illegal activity. Gebrayel considers the statute unconstitutional because "pattern of illegal activity" is susceptible of more than one meaning. Interpretation of the statute is a question of law reviewed de novo. United States v. Varbel, 780 F.2d 758, 761 (9th Cir. 1986).

Gebrayel argues that "pattern of illegal activity" could mean either of two things. Individual CTRA violations could aggregate to constitute a pattern of illegal activity, as the government charged here. Alternatively, the phrase could refer to CTRA violations that occurred as part of illegal activities

unrelated to the reporting requirements, such as violations of state or local laws. Gebrayel contends that the lack of clarity renders the statute unconstitutionally vague.

We do not regard Section 5322(b) as vague merely because it may encompass more than one category of repeated illegal activity. To succeed in his contention that the section is unconstitutionally vague, Gebrayel must demonstrate that the statute is vague as applied to his conduct in this case. United States v. So, 755 F.2d 1350, 1355 (9th Cir. 1985). We have held, however, that Congress clearly intended to punish as a felony multiple violations of CTRA itself. United States v. Beusch, 596 F.2d 871 (9th Cir. 1979). In Beusch, we reversed the dismissal of a felony indictment appended to an indictment for

377 admitted misdemeanor CTRA violations. Without making a factual finding of violation, we held that a series of misdemeanor violations could constitute a pattern of illegal activity under Section 5322(b), warranting punishment as a felony. Id. at 878-79; accord United States v. Dickinson, 706 F.2d 88, 91-92 (2d Cir. 1983).

Congress's intent to enhance the punishment for multiple violations of CTRA is also apparent from the legislative history of Section 5322. See So, 755 F.2d at 1354-55. That history, and our decisions under it, is fatal to Gebrayel's contention that the provision is unconstitutionally vague. Id. at 1355; see also United States v. Kattan-Kassin, 696 F.2d 893, 895-96 (11th Cir. 1983). The felony provisions of Section 5322(b) were therefore properly applied

to Gebrayel's participation in a series of CTRA violations aggregating to in excess of $100,000.

II. Racially Motivated Investigation

Gebrayel next charges that the government violated due process in this case by engaging in a racially biased investigation. He argues that his conviction should be reversed as a result of this "outrageous" conduct. Allegations of government misconduct that contravenes due process are reviewed de novo. United States v. Wylie, 625 F.2d 1371, 1378 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).

The government has broad prosecutorial discretion, but the decision whether or not to prosecute may not be based on an "unjustifiable standard such as race, religion, or other arbitrary classifica-

tion." Wayte v. United States, 105 S. Ct. 1524, 1531 (1985) (citations omitted). In this circuit, a charge of selective prosecution requires a showing by the defendant that (1) others similarly situated generally have not been prosecuted for similar conduct and (2) the selection was based on an impermissible ground such as race, religion or exercise of first amendment free speech rights. United States v. Arias, 575 F.2d 253, 255 (9th Cir.), cert. denied, 439 U.S. 868 (1978).

Gebrayel made no such showing. His charge is a bare assertion without any specific factual allegations beyond the facts that Acosta and Rodriguez are both of Latin ancestry; that the Bank catered to foreign in particular Latin American, customers; and that Gebrayel is of Lebanese ancestry. As the burden clearly

rests with Gebrayel to show selective prosecution, his claim must fail.

III. Entrapment

Gebrayel next argues that he was entitled to a jury instruction on entrapment. We review a judge's decision to deny an entrapment instruction for abuse of discretion. United States v. Fleishman, 684 F.2d 1329, 1342 (9th Cir.), cert. denied, 459 U.S. 1044 (1982).

The primary issue in entrapment is the defendant's predisposition to commit the crime. E.g., Hampton v. Unitd States, 425 U.S. 484, 490 (1976). Although we have identified several factors that should be considered when determining predisposition, see United States v. Diggs, 649 F.2d 731, 739 (9th Cir.), cert. denied, 454 U.S. 970 (1981), a defendant's reluctance to engage in the

criminal activity has been deemed the most important factor. United States v. So, 755 F.2d 1350, 1354 (9th Cir. 1985).

Gebrayel made the first suggestion of illegal conduct, and he showed no reluctance to involve himself in the conspiracy. It is true that Agent Berry brought the funds to the Bank and asked to deposit them secretly. But Berry neither suggested any specific criminal acts nor induced Gebrayel to engage in illegal conduct. The mere fact that the government or its agents afford the opportunities or facilities for the commission of a crime does not defeat the prosecution. United States v. Marcello, 731 F.2d 1354, 1357 (9th Cir. 1984); see also Sorrells v. United States, 287 U.S. 435, 441 (1932).

A defendant must put forward sufficient facts to raise a jury issue on

entrapment before an instruction is required. United States v. Shapiro, 669 F.2d 593, 598 (9th Cir. 1982). The trial court asked counsel for both Acosta and Gebrayel to produce some evidence that would justify an entrapment instruction, and they pointed to almost none.[3] "Although only slight evidence is needed to . . . get the defense to the jury,

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3 Defendants noted only two facts: (1) that the crime could not have occurred without Agent Berry bringing the money to the Bank and (2) that Berry first told Acosta he was American and then changed his story and said he had dual citizenship and a Mexican passport when Acosta was considering how to set up a secret account for Berry. R.T. 866-68. The first fact is clearly insufficient. The second fact supposedly showed that, when Berry noted Acosta's resistance to completing the crime, Berry immediately altered his story to facilitate completion of the crime. We find no such "resistance" to have been demonstrated, particularly on Gebrayel's part. We conclude that this second fact is insufficient to raise a jury issue on entrapment.

this evidence must at least suggest that the defendant was initially unwilling to commit the crime, or that Government involvement planted the criminal design in the defendant's mind." Fleishman, 684 F.2d at 1342. We conclude that the evidence was insufficient to raise the entrapment issue. The trial court did not abuse its discretion in refusing the instruction.

IV. References to Laundering of Funds

During his opening statement, the prosecutor referred five times to Gebrayel's acts as "money laundering." In his summation, the prosecutor used the term once more. Gebrayel contends that this characterization was so improper and prejudicial that his conviction should

now be reversed for plain error under Fed. R. Crim. P. 52(b).[4]

The plain error standard is a very high threshold. In United States v. Young, 105 S. Ct. 1038 (1985), the Supreme Court stressed the sparing use of the plain error doctrine to correct only "'particularly egregious errors'" that "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" Id. at 1046-47 (quoting United States v. Frady, 456 U.S. 152, 163 (1982) and United States v. Atkinson, 297 U.S. 157, 160 (1936)). The Court made

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4 Although Acosta objected to the remarks in the government's opening statement, Gebrayel apparently did not. There was no objection to the reference during closing argument. Thus, we review now only for plain error. United States v. Kennedy, 714 F.2d 968, 976 (9th Cir. 1983), cert. denied, 465 U.S. 1034 (1984).

clear that, standing alone, inappropriate comments by a prosecutor would not justify a reviewing court in reversing a criminal conviction obtained in an otherwise fair proceeding. Any immoderate comments must be examined within the context of the entire trial to determine whether they constituted prejudicial error. Id. at 1045.

The references complained of here do not satisfy the plain error standard. Contrary to implications in Gebrayel's brief, the prosecutor's comments did not refer to a connection with narcotics or other illicit activities. The words "money laundering" were apparently used six times during eight days of trial.[5]

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5 Although money laundering may further criminal enterprises, recent decisions of this court make clear that money laundering is not, in and of itself, a crime. See United States v. Dela Espriella, 781 F.2d 1432, 1435 (9th Cir. 1986); United

Indeed, the government persuasively argues that the remarks did not constitute error at all and were instead a fair characterization of Gebrayel's activities.

V. Sufficiency of the Evidence

Gebrayel attacks the sufficiency of the evidence on three fronts. To succeed, he must show that, when the evidence is viewed in the light most favorable to the government, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

States v. Varbel, 780 F.2d 758, 761-63 (9th Cir. 1986).

A. Conspiracy

First, Gebrayel contends that there was insufficient evidence to convict him of conspiracy because there was no possible coconspirator.[6] The government asserts the Rodriguez was the other party to the conspiracy. Gebrayel disagrees, pointing to Rodriguez's withdrawn guilty plea and the government's subsequent failure to prosecute him on misdemeanor charges.

The plea withdrawal does not affect Gebrayel's conspiracy conviction. We have held that a conspiracy conviction

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6 Gebrayel apparently concedes that, if a second party to the conspiracy legally existed, there was sufficient evidence to sustain the conviction. If, however, Gebrayel is making a separate sufficiency challenge, it fails. The government refers to various examples of incriminating evidence against Gebrayel, and he makes no specific challenge to any of it. The evidence was sufficient.

does not depend on conviction of coconspirators so long as the guilty verdict is not inherently inconsistent, as where all but one of the alleged coconspirators are acquitted at the same trial. See United States v. Wright, 742 F.2d 1215, 1224 (9th Cir. 1984); United States v. Sangmeister, 685 F.2d 1124, 1126-27 (9th Cir. 1982).

In Sangmeister, we upheld a conspiracy conviction where there was sufficient evidence of an agreement to accomplish an illegal objective even though the jury deadlocked in the alleged coconspirator. We noted that conspiracy convictions may stand if the coconspirator is acquitted in a separate trial or if the coconspirator is immune from prosecution. Further, the government has discretion to prosecute only one member of the conspiracy; a conviction may stand even if the govern-

ment drops charges against all other alleged coconspirators. 685 F.2d at 1127. The fact that Rodriguez later withdrew his guilty plea and was not prosecuted further does not disable him as a coconspirator.

B. Intent

Next, Gebrayel contends that there was insufficient evidence of a willful intent to violate CTRA reporting requirements. First, he asserts that the regulations do not clearly apply to deposits made in the form of repurchase agreements such as those involved in several of the transactions here.[7] He argues that, because 31

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7 Repurchase agreements are in essence short-term loans from one financial institutional to another. The lender (depositor) buys a bond for immediate delivery from the borrower institution and agrees to sell the security back at a specified time, when the borrower's need for immediate cash has passed. Repur-

C.F.R. § 103.22(a) does not specifically include repurchase agreements within its scope, he had a bona fide, reasonable belief that he was not obligated to file CTR's for these transactions.

The clear wording of the regulation is certainly broad enough to encompass repurchase agreements.[8] Nothing indi-

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chase is at the same price paid plus interest at a specified rate. The interest rate on repurchase agreements is generally at or a few points below the prevailing market price for borrowed funds. Thus, funds invested in repurchase agreements instead of normal deposit accounts will frequently earn more interest for the investor. See generally Encyclopedia of Banking and Finance 827 (8th ed. 1983) (G. Munn & F. Garcia, eds.).

8 31 C.F.R. § 103.22(a) (1984) states, in pertinent part:

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

cates that Gebrayel did not or could not make his "mistake" argument to the jury. It apparently resolved the factual dispute against him. The government points to sufficient evidence in the record to support an inference that Gebrayel knowingly violated the regulations.

C. **Designation of a CTR Form**

Finally, Gebrayel argues that the government never proved that any CTR form had been designated by the Secretary of the Treasury, as required under 31 C.F.R. § 103.22. Because of this failure of proof, he feels his conviction must be reversed. We reject this argument.

Gebrayel points to no authority for his proposition. Cases discussing the elements of CTRA violations have never mentioned a need to prove form designation. See, e.g., United States v. Dickinson, 706 F.2d 88, 91-92 (2nd Cir.

1983); United States v. Beusch, 596 F.2d 871, 878-79 (9th Cir. 1979). Further, 31 C.F.R. § 103.25 makes clear reference to the existence of appropriate reporting forms and their source.

The evidence showed that Gebrayel has seen several Forms 4789, had read them, knew of the filing requirements (which are printed on the reverse side of the form), and ignored them. Finally, it does not appear that Gebrayel otherwise made any attempt to comply with the filing requirements.

VI. Denial of the New Trial

Gebrayel contends that government attorney Donald Campbell and Rodriguez had agreed well before trial that the government would support Rodriguez's later motion to withdraw his guilty plea and that this information was improperly

withheld from the defense. He contends that Rodriguez lied on the witness stand about his plea arrangement with the government. As a result, Gebrayel believes that he should receive a new trial during which a full cross-examination of Rodriguez would be possible without any perjured testimony about deals made with the government.[9]

Despite the government's denial of any hidden deal with Rodriguez,[10] the

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9 Gebrayel also believes that the government's failure to prosecute Rodriguez may invalidate Gebrayel's conspiracy conviction because it allegedly leaves the government without a coconspirator. This contention was rejected supra in Part V(A).

10 At oral argument on Rodriguez's plea withdrawal motion, Campbell indicated that he had been initially unwilling to permit Rodriguez to plead to only a misdemeanor charge because Campbell believed incorrectly that Rodriguez had violated CTRA for personal gain before joining the Bank. When he learned that

district court denied Gebrayel's new trial motion while assuming the truth of his allegations. As the government noted at oral argument, it might have been preferable for the district court to resolve the factual dispute. It did not do so, however. For purposes of this appeal, therefore, we must assume the factual validity of the charge.

The dispute here centers on the appropriate standard of harmless error. The government argues that the district court decision was proper under United States v. Bagley, 105 S. Ct. 3375

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any previous CTRA violations were the result of Rodriguez's belief that CTR's were not required on the transactions involved, Campbell testified that he changed his mind about the need to punish Rodriguez as a felon.

(1985).[11] Gebrayel believes, however, that the harmless error standard of Chapman v. California, 386 U.S. 18, 24 (1967) (harmless beyond a reasonable doubt), should control because he contends that Rodriguez perjured himself when he testified about his plea arrangement with the government and that the government made knowing use of this perjured testimony. See Bagley, 105 S. Ct. at 3382 & n. 9. The government

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11 Under Bagley, incomplete or unresponsive prosecution disclosures made in response to request under Brady v. Maryland, 373 U.S. 83 (1963), do not require automatic reversal. Instead, reversal is necessary only if the undisclosed information was material, meaning "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 105 S.Ct. at 3384.

asserts that nothing Rodriguez said on the witness stand was untrue. Instead, the government states that Gebrayel simply failed to ask the right questions.

We need not decide which standard is appropriate here because we conclude that under either standard, the district court properly denied the new trial motion. Gebrayel does not contend that Rodriguez lied about the events that took place at the Bank. The only alleged "perjury" concerns the scope of Rodriguez's plea bargain. Rodriguez was fully cross-examined about the favorable plea bargain that was apparent at the time of Gebrayel's trial. Any testimony about a more favorable bargain would be most unlikely to influence a reasonable juror. We are convinced beyond a reasonable doubt that Gebrayel would have been unable to impeach Rodriguez seriously

even if the facts were as Gebrayel alleges. We are similarly convinced that any effect that Rodriguez's plea of guilty had on the jury's consideration of the conspiracy charge against Gebrayel would have remained the same had the alleged bargain to permit withdrawal been revealed. The error, if any, was harmless beyond a reasonable doubt.

CONCLUSION

The judgments of conviction and denial of a new trial are AFFIRMED.

C O N F I D E N T I A L

TO THE

HONORABLE ALFREDO MARQUEZ

UNITED STATES DISTRICT JUDGE

GOVERNMENT'S TRIAL MEMORANDUM

LAMONT R. MILLS
United States Attorney
DONALD J. CAMPBELL
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300 South Fourth Street #1005
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(702) 388-6363

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. PAN AMERICAN INTERNATIONAL BANK, RAFAEL ACOSTA, GEORGE GEBRAYEL, and RICHARD RODRIGUEZ	Cr. LV 83-89, RDF GOVERNMENT'S TRIAL MEMORANDUM

The United States of America, by and through LAMOND R. MILLS, United States Attorney, and DONALD J. CAMPBELL, Attorney in Charge, Las Vegas Task Force, respectfully submits the following memorandum for the use and convenience of this Honorable Court.

I

FACTUAL STATEMENTS

Introduction

PAN AMERICAN INTERNATIONAL BANK (PAIB) opened for business in July, 1982. Prior to the Bank being established, several federal agencies received both informant and intelligence information to the effect that RAFAEL ACOSTA, the Bank's Chairman, intended to use the Bank to launder narcotics money. Accordingly, the Criminal Investigation Division of the Internal Revenue Service sought to introduce an undercover agent to the management of the Bank.

The undercover agent used for this operation was Special Agent Michael Berry. Berry's undercover role was that of Miguel Holguin, a corrupt major in the Mexican Police who was the aid to Col. German Ferriola, the liaison officer for

Mexico to the Southwest region of the United States.[1]/ Berry's cover was supported by numerous Mexican credentials obtained from the Government of Mexico through the intercession of the State Department, more specifically, Ambassador John Gavin.

1/ Paranthetically, Ferriola was in the Witness Protection Program from 1973 to 1975 due to his assistance in a narcotics investigation in New York.

(The balance of the memorandum is not reproduced.)

Filed September 19, 1984

JAMES J. BROWN, ESQUIRE
830 East Charleston Blvd.
Las Vegas, NV 89104
(704) 384-3553
Attorney for Defendant,
RICHARD RODRIGUEZ

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. PAN AMERICA INTERNATIONAL BANK, RAFAEL ACOSTA, GEORGE GEBRAYEL AND RICHARD RODRIGUEZ, Defendants.	)	CR. LV-83-89, HEC

MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND WITHDRAW PLEA OF GUILTY

COMES NOW, the Defendant, RICHARD RODRIGUEZ, and moves the Court pursuant to Federal Rules of Criminal Procedure, Rule 32(d), to set aside his judgment of conviction entered on the 21st of November, 1983, and permit him to withdraw his plea of guilty, to correct a manifest injustice.

Movant will rely upon the records, documents and pleadings on file herein, the Affidavit of JAMES J. BROWN attached hereto and such evidence and arguments as may be adduced at the hearing held hereon, if any.

JAMES J. BROWN, ESQUIRE
830 E. Charleston Blvd.
Las Vegas, NV 89104
Attorney for RICHARD RODRIGUEZ

MEMORANDUM OF AUTHORITIES

The Federal Rules of Criminal Procedure, Rule 32(d) provides:

> (d) Withdrawal of Plea of Guilty. A Motion to Withraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

In the instant action the prosecutor was under a mistaken understanding of the facts of Defendant, RICHARD RODRIGUEZ's involvement in the criminal acts and his culpability. It was solely upon this mistake of fact that the prosecutor refused to negotiate to allow the Defendant to plead to an offense resulting in less than a felony conviction. cf. United States vs. Myers, (C.A. 3rd 1967), 374 F.2d 707, where the sentencing judge had misread the Defendant's criminal record and sentenced him believing he had three prior convictions. Also, see,

United States vs. Weston, (C.A. 9th 1971) 448 F.2d 626.

To require the Defendant, a 28 year man to suffer the penalties imposed by a felony conviction where but for a mistake of fact he would not have such permanent penalty, is a manifest injustice requiring correction by the Court.

This Court is given broad discretion in allowing Defendant relief under F.R.Cr.P. 32(d) and greater leeway than that given under Title 28 Section 2255. United States vs. Kent, (C.A. 7 1968) 397 F.2d 446, cert. den. 89 S.Ct. 860; United States vs. Tivis, (D.C. Tex. 1969), 302 F. Supp. 581, Aff. 421 F.2d 147; Sims vs. United States, (D.C. Md. 1966), 272 F. Supp. 577, Aff. 382 F.2d 294, cert. den. 88 S.Ct. 1062, allows the Court to permit withdrawal of plea even though the guilty plea was voluntary and the Defendant was afforded due process.

The Defendant in seeking to withdraw his guilty plea is not seeking a trial upon the merits rather only be allowed to enter a guilty plea whereby he will not suffer from a felony conviction.

DATED this 17th day of September, 1984.

JAMES J. BROWN, ESQUIRE
830 E. Charleston Blvd.
Las Vegas, NV 89104
Attorney for RICHARD RODRIGUEZ

AFFIDAVIT OF JAMES J. BROWN

STATE OF NEVADA)
)
COUNTY OF CLARK)

JAMES J. BROWN, being first duly sworn upon his oath, deposes and says:

That your Affiant is an attorney duly admitted to practice before the United States District Court for the District of Nevada.

That your Affiant became attorney of record for the Defendant on September 27, 1983, after Defendant's previous counsel, JOSEPH W. HOUSTON, II, moved to withdraw as counsel.

That at the time Affiant became counsel for the Defendant, the Defendant had entered a plea of guilty to Count I of the indictment charging him with conspiracy in violation of Title 18, Section 371 of the United States Code pursuant to a written plea negotiation

agreement pursuant to Federal Rules of Criminal Procedure 11. That as part of the plea negotiation agreement, the Defendant, RICHARD RODRIGUEZ, agreed to cooperate with the United States Government in the investigation of the Co-Defendants together with testifying at the trial of the Co-Defendants. That the Defendant fully cooperated and performed as agreed.

That your Affiant was advised by DONALD CAMPBELL, Assistant United States Attorney, in charge of the prosecution of the Defendant and Co-Defendants that during the preparation of the trial of the Co-Defendants was the first time he became aware the Defendant, RICHARD RODRIGUEZ had not been involved in the activity on prior occasions which was the subject of the criminal charge. Specifically, your Affiant was advised by DONALD

CAMPBELL that he believed at the time he discussed plea negotiations with JOSEPH W. HOUSTON, II, the Defendant, RICHARD RODRIGUEZ, had failed to file currency transaction reports on prior occasions for personal gain by receiving compensation from customers for not filing such currency transaction reports, as required by Title 81 of the United States Code, Sections 5313, 5322.

Your Affiant was advised by DONALD CAMPBELL that he specifically told Defendant's counsel, JOSEPH W. HOUSTON, II, that that was the reason he would not allow the Defendant to plead to an offense less than a felony. That DONALD CAMPBELL told your Affiant he was not advised by JOSEPH W. HOUSTON, II, that the Defendant, RICHARD RODRIGUEZ had not committed the offense for personal gain on prior occasions and therefore did

believe such fact to be the case until learning to the contrary during the preparation for the trial of the Co-Defendants.

That your Affiant has been advised by DONALD CAMPBELL that had he been aware of the true facts, he would not have compelled the Defendant to plead to a felony as a part of the negotiation and would have permitted the Defendant to enter a plea for deferred sentence.

That your Affiant does believe that a manifest injustice has occurred to the Defendant in the instant case and the Court should set aside his conviction, allow him to withdraw his plea and enter a plea of guilty whereby he does not suffer from a felony conviction.

Further your Affiant sayeth not.

JAMES J. BROWN

Subscribed and Sworn to before me

this 17th day of September, 1984.

NOTARY PUBLIC

(SEAL)
MARY ANN P. BURG
Notary Public-State of Nevada
Clark County
My Appointment Expires September 26, 1987

RECEIPT OF A COPY of the foregoing MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND WITHDRAW PLEA OF GUILTY is hereby acknowledge this 18 day of September, 1984.

UNITED STATES ATTORNEY

_____

DONALD CAMPBELL,
Attorney-in-Charge,
Las Vegas Task Force
300 Las Vegas Blvd., South
Las Vegas, NV 89101

LAMOND R. MILLS
United States Attorney
DONALD J. CAMPBELL
Attorney in Charge
Las Vegas Task Force
300 So. Fourth Street #1005
Las Vegas, Nevada 89101
(702) 388-6363

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA Plaintiff, vs. PAN AMERICAN INTERNATIONAL BANK, Et al., Defendants.	Cr. LV 83-89 HEC GOVERNMENT'S RESONSE TO DEFENDANT RICHARD RODRIGUEZ'S MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND WITHDRAW OF PLEA OF GUILTY

COMES NOW the United States of America, by and through LAMOND R. MILLS, United States Attorney, and DONALD J. CAMPBELL, Attorney in Charge, Las Vegas Task Force, and with regard to the above-

captioned motion files the following response:

It is the position of the Government that a full and adequate response to Defendant RICHARD RODRIGUEZ's Motion to Set Aside Judgment of Conviction and Withdrawal of Plea of Guilty, can not be formulated without a hearing to ascertain the circumstances surrounding Mr. Rodriguez's entry of plea. It is immediately apparent that in such hearing Mr. Rodriguez's attorney, Mr. Brown, intends to call the undersigned as a witness in an effort to elicit certain testimony in support of his client's claim for relief. Accordingly, it is respectfully suggested that a time certain be set for a hearing of this matter for the purpose of enabling both the Government and counsel for Mr. Rodriguez to subpoena the necessary witnesses in order to present a clear

picture of the foundation upon which Mr. Rodriguez's motion rests.

DATED this 5th day of October, 1984.

Respectfully su;bmitted,

LAMOND R. MILLS
United States Attorney

DONALD J. CAMPBELL
Attorney in Charge
Las Vegas Task Force

LAMOND R. MILLS
United States Attorney
DONALD J. CAMPBELL
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA Plaintiff, vs. PAN AMERICAN INTERNATIONAL BANK, Et al., Defendants.	Cr. LV 83-89 HEC GOVERNMENT'S RESONSE TO DEFENDANT RICHARD RODRIGUEZ'S MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND WITHDRAW OF PLEA OF GUILTY

I, Robin Skone-Palmer, certify that I am an employee of the United States Attorney's Office and a person of such age and discretion as to be able to serve papers.

On October 5, 1984, I served a copy of the above-captioned motion on James J. Brown, Esquire, attorney for Richard Rodriguez, by placing said motion in a post-paid envelope address to him at 830 East Charlest (sic) Blvd., Las Veas, (sic) NV 89104, which is his last known address, and by placing said envelope in the United States mail.

Robin Skone-Palmer

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA	)	
vs.	)	Case No. 83-0166M
PREMISES OF PAN AMERICAN INTERNATIONAL BANK, 1901 SOUTH DECATUR BOULEVARD, LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA.	)	SEARCH WARRANT

TO: ANY SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE

Affidavit having been made before me by Larry C. Halper, Special Agent, Inter-

nal Revenue Service, Criminal Investigation Division, Las Vegas, Nevada, that he has reason to believe that on the PREMISES OF PAN AMERICAN INTERNATIONAL BANK, 1901 SOUTH DECATUR BOULEVARD, LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA, more specifically described as being situated on the eastern side of Decatur with the main entrance facing west. The bank is a one-story building which appears to be constructed of wood and metal materials. The bank is brown in color. The front entrance consists of two plate glass doors which are bordered on either side by a ramp which leads to this main entrance area. Physically located on the right side of the front entrance is a rectangular sign reading "Pan American International Bank". Directly in front of the building is a larger neon sign, blue and white in color, which reads "Pan

American Bank" and displays the PAN AMERICAN INTERNATIONAL BANK logo which is a "P" interceted by the letters "A" and "B"; there is now being concealed therein certain property, namely,

(a) All records pertaining to the accounts of Marion Fernandez, Emma Wulze, Shief (sic) F. Amhaz, Bart Sloan, Carlos Sama, Carlos Soto, and Partout Distributing company, including signature cards, statements of account, deposit slips, withdrawl (sic) tickets, checks, loan records, wire transfer records, foreign citizen declaration cards, and/or correspondence relating to those accounts.

(b) Those files containing each and every Currency Transaction Report maintained by the PAN AMERICAN INTERNATIONAL BANK since the date of its opening

July 19, 1982, up to and including the present date.

(c) Internal Revenue Service letter from Anders Flodin to PAN AMERICAN INTERNATIONAL BANK regarding the filing of Currency Transaction Reports.

(d) The entire file containing each and every repurchase agreement, chart of repurchase agreements and chart of accounts for repurchase agreements contained in the desk of Marta L. Lovinger located in the interior of PAN AMERICAN INTERNATIONAL BANK.

(e) The stockholder proxy file located in the filing cabinet in the executive office containing documents supporting transfer of two thousand five hundred (2,500) shares of stock in PAN AMERICAN INTERNATIONAL BANK to Jose Garcia. (As this Court is well aware, the earlier search warrant commanded the

executing agents to seize similar type evidence relating to the false and fictitious person of Jose Garcia and it is simply out of an abundance of caution that such records relating to the transaction involving that person are once again named and sought in this warrant.)

(f) A .357 magnum handgun found by agents during the course of the earlier search bearing Serial Number E72876, and which has been determined to be an unregistered weapon, which are the evidence of a crime of one or more violations of Title 31, United States Code, Sections 5313 and 5322, Title 31, Code of Federal Regulations, Sections 103.22 and 103.25, Title 18, United States Code, Sections 371, 1001 and 2. I am satisfied that there is probable cause to believe that the afore-mentioned items are concealed on the heretofore described prem-

ises and that the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED to search forthwith the place named for the property specified, serving this warrant and making the search at anytime of day or night, and if the property described be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and to prepare a written inventory of the items seized and return this warrant to the undersigned United States Magistrate and Court, accompanied by the written inventory of any items taken, within ten (10) days of this date as required by law.

DATED: July 13, 1983
TIME: 11:54 p.m.

PHILIP M. PRO
United States Magistrate

AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

J. Thomas Hampton, being first duly sworn, deposes and says:

EXPERTISE OF AFFIANT

Your affiant is the tandem case agent on the investigation involving PAN AMERICAN INTERNATIONAL BANK. Your affiant has been employed with the Internal Revenue Service for a period of nine (9) years, the last four of which have been with the Criminal Investigation Division. Your affiant is intimately familiar with financial investigations through both extensive training and experience. Similiarly, (sic) your affiant is intimately familiar with the investigation

regarding PAN AMERICAN INTERNATIONAL BANK, and accordingly, seeks to incorporate specifically herein by reference the earlier affidavit submitted to this Honorable Court for the search of PAN AMERICAN INTENATIONAL BANK, subscribed and sworn to by Larry C. Halper. Your affiant has read this affidavit in its entirety and concurs in the statements made therein. This affidavit and search warrant, earlier executed, is attached hereto as Exhibit "A".

At approximately 5:00 p.m. on this date, the earlier search warrant referenced in Paragraph 1 and attached hereto as Exhibit "A" was served upon the PAN AMERICAN INTERNATIONAL BANK. During the course of that search numerous articles described in the serach (sic) warrant were indeed found to be present in the bank. MR. RICHARD RODRIGUEZ, who was

earlier indicted by the Federal Grand Jury for a violations of Title 18, United States Code, Sections 371 and 1001 and Title 31, United States Code, Section 5322, was arrested. After having been fully advised of his rights as per the Miranda decision of the United States Supreme Court, and having agreed to waive those rights both orally and in writing, RICHARD RODRIGUEZ agreed to extend his full cooperation to the Internal Revenue Service.

STATEMENT MADE BY RODRIGUEZ

1. MR. RICHARD RODRIGUEZ has told several agents of the Internal Revenue Service that MR. RAFAEL ACOSTA uses false names and nominee accounts as a matter of course to conceal extremely large deposits at the PAN AMERICAN INTERNATIONAL BANK for select customers. RODRIGUEZ has

also informed the agents that ACOSTA does this on his own behalf as well.

2. RODRIGUEZ agreed to accompany the agents to the PAN AMERICAN INTERNATIONAL BANK and took them to his desk where he pointed out the lower right hand drawer and revealed a file marked "Power of Attorney". In this file was documentation that on October 12, 1982, Mario Fernandez filed a Power of Attorney. RODRIGUEZ has identified Mario Fernandez as being a false and fictitious name used by ACOSTA as a nominee account for running through large sums of money without filing Currency Transaction Reports herein after referred to as CTRs. MR. RODRIGUEZ also disclosed that within this file was a Power of Attorney for Emma Wulze dated March 5, 1980, which is also a nominee account used by ACOSTA to run large sums of money through without

filing CTRs. MR. RODRIGUEZ informed agents of the Internal Revenue Service that he knows of at least one occasion where the fictitious Wulze account was used to fund an uncollectable loan to Partout Distributing Company. Also included in this Power of Attorney file is the Power of Attorney of Ali Makdad dated February 18, 1983, memorializing a conveyance of a Power of Attorney to Sheik (sic) F. Amhaz. MR. RODRIGUEZ believes that the Ali Makdad account is a nominee account as well, but he does know that Sheik (sic) Amhaz exists because he has seen Amhaz come into the PAN AMERICAN INTERNATIONAL BANK on several occasions with large sums of money for which no CTRs were filed.

3. MR. RODRIGUEZ has also informed agents of the Internal Revenue Service that CTRs were not filed in numerous

other accounts in order to conceal the deposit/withdrawl (sic) of large sums of money. Yet another of these accounts was one in the name of Bart Sloan which according to RODRIGUEZ raised the curiosity of Bank examiners to the point where the PAN AMERICAN INTERNATIONAL BANK felt it necessary to file late CTRs in order to conceal their earlier omissions.

4. RODRIGUEZ has further identified yet another false and fictitious account under the name of Carlos Sama which conceals RODRIGUEZ has informed agents of the Internal Revenue Service that the Sama account has been used in the past to reflect non-existent transfers to the person of Miguel Pulido. The Sama account has also been identified as one of those accounts for which no CTRs were filed.

5. RODRIGUEZ has also informed agents of the Internal Revenue Service, during the course of conversations with them, that the PAN AMERICAN INTENATIONAL BANK received a letter from Anders Flodin, Internal Revenue Service, setting forth, in full, the reporting requirements involving currency transactions. RODRIGUEZ advised the agents that this letter is still intact in the general CTR file.

6. MR. RODRIGUEZ went on to state that located in the desk of Marta L. Lovinger, Account Clerk for PAN AMERICAN INTERNATIONAL BANK is located a file containing the 1982 and 1983 repurchase agreements, a chart of these repurchase agreements and a list of corresponding accounts for these repurchase agreements. RODRIGUEZ has stated that the bank has used numerous repurchase agreements to

conceal the flow of deposits and withdrawls (sic) from accounts. More specifically, numerous repurchase agreements have listed the false and fictitious name of Jose Garcia as the principal in the transaction.

7. RODRIGUEZ has informed agents of the Internal Revenue Service that located in a file cabinet in the executive office of PAN AMERICAN INTERNATIONAL BANK is a blue file folder containing the Sheik (sic) F. Amahaz file which was earlier referred to as an account which has received significantly large deposits without the requisite filing of CTRs. Also located in that file cabinet is a stockholder proxy file which reflects two thousand five hundred (2,500) shares of PAN AMERICAN INTERNATIONAL BANK being issued to the false and fictitious person of Jose Garcia.

STATEMENT OF KEN TEMPLETON

1. Your affiant respectfully informs this Honorable Court that agents of the Internal Revenue Service have interviewed Mr. Ken Templeton, who is an investor in and director of PAN AMERICAN INTERNATIONAL BANK.

2. Mr. Templeton has told agents of the Internal Revenue Service that he has been informed by numerous bank employees that something "funny" has been going on at the bank for quite sometime (sic) and that the accounts of Jose Garcia, Emma Wulze and Partout Distributing Company have been used in a manner not consistent with generally accepted accounting principals and bank procedures.

3. Mr. Templeton went on to relate that questionable transactions involving these accounts motivated him to contact State Banking Examiners. These banking

examiners found numerous discrepancies and curious omissions, but according to Templeton, did not result in a closing of the bank. Templeton stated that because he called the bank examiners ACOSTA became extremely disgruntled thereaftrer adopting a hostile attitude towards Templeton when he voiced these objections.

4. Mr. Templeton has informed agents of the Internal Revenue Service that a large stack of new account applications may be found in the credenza belonging to Marta Lovinger. Mr. Templeton states that none of these new account applications contain social security numbers, which is high unusual in that banking institutions require this information to be supplied as to all domestic accounts.

STATEMENT OF YVONNE SABLICH

1. Your affiant informs this Honorable Court that special agents of the Internal Revenue Service have on this date interviewed Yvonne Sablich, the former Public Relations and New Accounts Executive of PAN AMERICAN INTERNATIONAL BANK. Ms. Sablich states that the Emma Wulze account did in fact experience significantly large deposits of cash for which no CTRs were initially filed but believed to have been alter drafted but not submitted.

CONCLUSION

1. Wherefore, your affiant would respectfully suggest that there exists an abundance of evidence which indicates PAN AMERICAN INTERNATIONAL BANK, its Chairman, its Vice-Chairman, Cashier, and other employees have been involved in a

continuing and on-going scheme to disguise and conceal large deposits of currency without the requisite filing of CTRs. Moreover, there exists overwhelmng evidence to suggest that RAFAEL ACOSTA and GEORGE GEBRAYEL have used nominee accounts to accomplish concealment of such transactions for both themselves and select customers, in violation of Title 18, United States Code, Sections 371 and 1001 and Title 31, United States Code, Sections 5313 and 5322, and the regulations thereunder.

2. Accordingly, your affiant respecfully requests this Honorable Court to issue and additional search warant (sic) for the premises of PAN AMERICAN INTERNATIONAL BANK for the purpose of searching for and seizing the following items:

(a) All records pertaining to the accounts of Mario Fernandez, Emma Wulze, Shief (sic) F. Amhaz, Bart Sloan, Carlos Sama, Carlos Soto, and Partout Distributing Company, including signature cards, statements of account, deposit slips, withdrawl (sic) tickets, checks, loan records, wire transfer records, foreign citizen declaration cards, and/or correspondence relating to those accounts.

(b) Those files containing each and every Currency Transaction Report maintained by the PAN AMERICAN INTERNATIONAL BANK since the date of its opening July 19, 1982, up to and including the present date.

(c) Internal Revenue Service letter from Anders Flodin to PAN AMERICAN INTERNATIONAL BANK regarding the filing of Currency Transaction Reports.

(d) The entire file containing each and every repurchase agreement, chart of repurchase agreements and chart of accounts for repurchase agreements contained in the desk of Marta L. Lovinger located in the interior of PAN AMERICAN INTERNATIONAL BANK.

(e) The stockholder proxy file located in the filing cabinet in the executive office containing documents supporting transfer of two thousand five hundred (2,500) shares of stock in PAN AMERICAN INTERNATIONAL BANK to Jose Garcia. (As this Court is well aware, the earlier search warrant commanded the executing agents to seize similar type evidence relating to the false and fictitious person of Jose Garcia and it is simply out of an abundance of caution that such records relating to the transaction involving that person are once

again named and sought in this warrant.)

3. Your affiant would also respectfully request that agents of the Internal Revenue Service be allowed to seize a .357 magnum handgun found by agents during the course of the earlier search bearing Serial Number E72876, and which has been determined to be an unregistered weapon. While this weapon does not hold any independent significance to the instant investigation, its seizure is sought because it is contraband and evidence of a violation of State law.

4. Your affiant informs the Court that at the time of the dictation of this affidavit agents of the Internal Revenue Service are continuing their search of the PAN AMERICAN INTERNATIONAL BANK under

the authorization of the earlier warrant attached hereto.

J. THOMAS HAMPTON
Special Agent
Internal Revenue Service

SUBSCRIBED and SWORN to before me this 13th day of July, 1983.

PHILIP M. PRO
United States Magistrate

Filed June 22, 1984
Carol , Deputy

FRANK J. CREMEN, ESQ.
302 East Carson Avenue, #1004
Las Vegas, Nevada 89101
Attorney for Defendant,
GEORGE GEBRAYEL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-o0o-

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CR. LV-83-89, RDF
vs.	)	
GEORGE GEBRAYEL, RAFAEL ACOSTA, et al.,	)	
Defendants.	)	

MOTION TO SUPPRESS

COMES NOW, the Defendants, GEORGE GEBRAYEL and RAFAEL ACOSTA, by and

through their attorneys, FRANK J. CREMEN and OSCAR GOODMAN, who ask this Court for an Order suppressing all evidence the government obtained as a result of a search warrant issued by the Honorable M. Pro on July 13, 1983 at 11:54 p.m.

This moton is predicated on the attached Points and Authorities and all pleadings and papers on file herein. It is here alleged that the Affidavit of J. Thomas Hampton, upon which the warrant is question was issued, was made in bad faith or in reckless disregard for the truth.

DATED this 22nd day of June, 1984.

FRANK J. CREMEN, ESQ.
302 East Carson Avenue,
#1004
Las Vegas, Nevada 89101

POINTS AND AUTHORITIES

The search warrant in question and the affidavit upon which it was issued, are attached hereto as Exhibits "A" and "B," respectively. This warrant was issued after the Government had already served and executed an earlier warrant at the Pan American International Bank, 1901 South Decatur Boulevard in Las Vegas, Nevada. At the time that the earlier warrant was executed, Richard Rodriguez, a bank cashier and a named defendant who has since pleaded guilty, was arrested. Afterwards, Rodriguez evidently spoke to Government officers, including J. Thomas Hampton. In his Affidavit application for the second warrant, Hampton devotes seven paragraphs to the statements that Richard Rodriguez allegedly made to Government agents after his arrest. Within the past two weeks, the Government

has provided to defense counsel, transcripts of recorded statements taken by Government agents of Richard Rodriguez on July 19, 1983. The transcript of the July 19th Rodriguez interview covers the same subjects that are covered in Hampton's Affidavit in support of this warrant. The transcript of this July 19, 1983 interview of Richard Rodriguez directly contradicts Hampton's Affidavit in every substative (sic) regard. See attached Exhibit "C".

Examining that section of the Hampton Affidavit concerning the Government's conversations with Richard Rodriguez, in the first paragraph Hampton states that Rodriguez related that the Defendant, RAFAEL ACOSTA, uses "false names and nominee accounts as a matter of course to conceal extremely large deposits. . . ." Hampton, here, clearly implies tht the

deposits in question are of cash, for afterall, cash deposits were and are the subject of the investigation and prosecution in this case. In fact, Rodriguez states on pages 43, and 44 of his July 19 statement, that the deposits were in check form. At page 44 he states that there were no cash deposits to his knowledge.

In Paragraph 2 of the Rodriguez section of his Affidavit, Hampton relates that Rodriguez told them that ACOSTA used a "fictitious account in the name of Mario Fernandez, to run through large sums of money without filing currency transaction reports." In fact, Rodriguez states at page 26 of his July 19 statement, that Fernandez is a person whom he has never seen and that the signature card, or a signature that is similar to RAFAEL ACOSTA'S. He did not state that

the account was false or fictitious. Nor does he ever state anywhere in the entire transcript of the July 19 meeting that ACOSTA ran cash through this or any account. In fact, at page 38 of his transcript, Rodriguez states that the only large sums of cash he can recall ever having been brought to the bank were those of the Government Agent, Michael Berry, in the instant case.

Hampton also states in paragraph 2 of the Rodriguez section of his Affidavit, that ACOSTA told him that GEORGE GEBRAYEL ran through large sums of cash through an account in the name of Emma Wulze, without filing a CTR. In fact, Rodriguez states at page 17 of his July 19 statement, that part of the proceeds of a loan to Partout Distributing Company, had been placed by GEBRAYEL In (sic) the Wulze account. Never does he state that those

proceeds are in the form of cash and that a CTR was not filed. In fact, his statement at page 38 of his transcript, belies such an allegation.

His statement at page 38 of the July 19 statement also belies the allegation made by Hampton in paragraph 2 of the Rodriguez section of his Affidavit that an account in the name Shiek Amahaz, was used by the Defendants to run through large sums of cash without CTR's. In fact, Rodriguez never made such a statement.

In paragraph III of the Rodriguez section of his Affidavit, Hampton states that Rodriguez told them that CTR's were not filed in numerous other accounts in order to conceal the deposit and withdrawal of large sums of money. One can read the entire July 19 statement of Richard Rodriguez and nowhere is such an

allegation contained. As page 56 of the Rodriguez, July 19 statement, there is the only possible passage that could possibly relate to such an allegation. It is here stated in full:

RODRIGUEZ: Dick Kruger brought over - he was the General Manager of (unintelligible) West and when the FDIC was auditing us, they was a couple of transactions that he had done that were not reported and once we found out that they weren't reported we went ahead and made up the currency transaction reports and filed them.

HALPER: Apparently just an oversight. . .

In paragraph 4 of the Hampton Affidavit, Hampton states that Rodriguez told Government Agents that Carlos Soto, under the fictitious name of Carlos Sama, used his Sama account to reflect non-existent transfers to the person of Miguel Pulido"

and that the Sama account was one of which no CTR's were filed. In fact, Rodriguez told them at page 12 and 27 of is July 19 statement, that Carlos Soto and Carlos Sama were the same person. (As this Court may or may not know, people of Spanish ancestry often have multiple sir names which, in this country, are often used interchangably.) Rodriguez states that all that Soto, aka Sama, did, was cash a cashiers check in the amount of seventeen or eighteen thousand dollars, that he had purchased in the name of Miguel Pulido, as was his right to do.

In paragraph 6 of his Rodriguez section of his Affidavit, Hampton states that Rodriguez told him that the bank has used numerous repurchase agreements to "conceal the flow of deposits and withdrawals from accounts." In fact, other

than for the transactions for which this prosecution is brought, Rodriguez never made such a statement.

In paragraph 7 of his Rodriguez section of his Affidavit, Hampton indicates that Rodriguez told Government Agents that Shiek F. Amahaz, has "received significantly large deposits without the records of filing CPR'S." In fact, at page 14 of the July 19 statement, Rodriguez states that he "can't recall if there was ever a large transaction for him."

It is interesting to note that not once in this July 19, 1983 conversation that Agents Hampton and Halper have with Rodriguez, do they challenge a single statement that he makes as contradictory of earlier statements that he may have given them. So numerous are the contradictions in the Hampton Affidavit and the

Rodriguez July 19 statement, and so substantive are those contradictions in nature, that one cannot escape the conclusion that Hampton either recklessly disregarded the truth or acted in bad faith. Perhaps it was his zeal for his job that motivated him, but the conclusion is inescapable that he acted improperly.

The contradictions continue in the Affidavit beyond those of Richard Rodriguez, for he also states that Yvonne Sablich told him that the Emma Wulze account "did in fact experience significantly large deposits of cash for which no CTR's were initially filed, but believed to have been late drafted but not submitted." On July 20, 1983, Agents Hampton and Halper also recorded a statement with her, which the Government has recently provided to the defense in this

matter. In this statement, nowhere does Sablich make such a statement.*

In Franks v. Delaware, 438 US 154, 98 S.Ct. Rptr. 2674 (1978), the Supreme Court held that when it is shown that a search warrant rests substantially upon a false affidavit made in bad faith on reckless disregard for the truth, the warrant must be voided. In this regard, the Supreme Court states as follows:

> "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negli-

> gence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing." Id, 908 S.Ct. 2684.

It is submitted that the attack that the Defendants here make upon the Affidavit of Mr. Hampton, meets in every regard, the requirements established by the Supreme Court to warrant an evidentiary hearing. The only portion of Hampton's Affidavit shown not to be false, is that section concerning the statements of Ken Templeton, non (sic) of which concern a violation of any State or Federal law, but rather are devoted to

"unusual banking occurrences." The warrant simply cannot stand on that section of the Hampton Affidavit concerning the statements of Ken Templeton. And mere negligence cannot be an explanation for the wildly divergent and contradictory statements contained in Hampton Affidavit and the Yvone (sic) Sablich and Richard Rodriguez statements of July 19 and 20, respectively.

Dated this 22 day of of June, 1984.

FRANK J. CREMEN, ESQ.
302 East Carson Avenue,
#1004
Las Vegas, Nevada 89101

* In fact, the one transaction concerning the account that she mentions, she states involved the deposit of a check.

RECEIPT TO COPY

RECEIPT OF A COPY of the foregoing MOTION TO SUPPRESS is hereby acknowledged this 22 day of June, 1984.

LAMOND R. MILLS
United States Attorney

DONALD J. CAMPBELL
Attorney-in-Charge

GOODMAN, TERRY, STEIN
& QUINTANA

OSCAR B. GOODMAN, ESQ.
Attorney for Defendant, ACOSTA

RECEIPT TO COPY

RECEIPT OF A COPY of the foregoing MOTION FOR NEW TRIAL is hereby acknowledged this 13th day of July, 1984.

U.S. ATTORNEYS OFFICE

_____
DON CAMPBELL
Las Vegas Task Force

Filed July 13, 1984
Carol , Deputy

FRANK J. CREMEN, ESQ.
302 East Carson Avenue, #1004
Las Vegas, Nevada 89101

(702) 385-7475

Attorney for Defendant,
GEORGE GEBRAYEL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CR. LV-83-89, LDG
vs.	)	
GEORGE GEBRAYEL, RAFAEL ACOSTA, et al.,	)	
Defendants.	)	

MOTION FOR NEW TRIAL

COMES NOW, GEORGE GEBRAYEL, by and through his attorney, Frank J. Cremen,

who moves this court for an Order granting to him a new trial on the indictment returned in this matter. This motion is made in the alternative to the motion for judgment of acquittal filed contemporaneously with this motion. The Defendant would ask that the court consider this motion only if denies the motion for judgment of acquittal and all counts.

This motion is based on the attached points and authorities, all pleadings and papers on file herein and all evidence heard by this court. This motion is made pursuant to F.R.Cr.P. 33.

DATED this 13th day of July, 1984.

FRANK J. CREMEN, ESQ.
302 East Carson Avenue,
#1004
Las Vegas, Nevada 89101
Attorney for Defendant
GEBRAYEL

POINTS AND AUTHORITIES

This indictment was conceived in deception and born in hysteria. The government, at all stages of the prosecution, fanned a fire of falsity it commenced concerning the true nature and quality of the acts supposedly committed by each of the named Defendants. The government publically stated that the named Defendants were "laundering drug money" at the Pan American International Bank. By word and by insinuation the government, at the trial of this matter, suggested that the Defendants were running a "money laundering operation" at the Pan American International Bank.

A fundamental injustice was therefore done to GEORGE GEBRAYEL at the trial of this matter for he was required to defend not only the offenses stated in the indictment, but those stated by the

prosecutor in his opening statement and implied through him and by him throughout these proceedings.

THE GOVERNMENT'S OPENING STATEMENT WHEREIN IT WAS STATED THAT THE DEFENDANTS WERE LAUNDERING MONEY WAS MADE RECKLESSLY AND NEVER SUBSTANTIATED

Vividly demonstrating the government's abandonment of its obligation to see that justice is done, was its opening statement wherein the prosecutor alleged that GEORGE GEBRAYEL and RAFAEL ACOSTA were "laundering" money at the Pan American International Bank. That phrase clearly suggested to the jury that these men were doing something illegally sinister at the bank. Certainly that is what the government implied and the jury may well have inferred from the government's opening statement.

As this court knows, the government was able to show absolutely no benefit derived by the Defendants as a result of the alleged failure to file transaction reports. Nor was the government able to show any other incident in which GEBRAYEL and ACOSTA were involved in not filing reports. The testimony of Richard Rodriguez was to the exact opposite. There simply weren't any other such incidents. Richard Rodriguez recalled for not another incident in which large sums of small bills came into the bank. He testified that the two government agents with whom he spoke were disappointing by what they found at the bank.

Despite this disappointment and despite this evident lack of proof the government persisted in misrepresenting this case to the jury, all to the detriment of this Defendant. Indeed, the

government never ever offered any testimony as to what "laundering money" is. The connotations of that phrase as generally understood provide fertile ground for active of imaginations.

THE DEFENDANTS' MOTION TO SUPPRESS SHOULD NOT BE HEARD AND GRANTED AS THE AFFIDAVIT OF AGENT HAMPTON THEREIN REFERENCED IS FALSE IN EVERY MATERIAL RESPECT.

Nothing can better demonstrate the deceit perpetrated by the government in its prosecution of this case than the demonstrably false affidavit of Agent Hampton in support of a second search warrant on July 13, 1983. The Defendant GEBRAYEL here adopts and incorporates by reference his Motion to Suppress filed on June 22, 1984 (see Exhibit "1" attached hereto).

Much of the documentary evidence utilized by the government in this recent

trial was retained as a result of that warrant. That warrant was issued and predicated upon a patently false affidavit. It was, at a minimum, made with a reckless disregard for the truth. In Franks v. Delaware, 438 U.S. 154 98 S.Ct. Rptr. 2674 (1978), the Supreme Court made it patently clear that a warrant issued on such an affidavit must be voided. Not even last week's Supreme Court decision concerning the good faith belief of a law enforcement officer in executing a warrant can help the government in this regard. The Supreme Court left intact the ruling in Franks v. Delaware, supra. Obviously, an officer who is guilty of deception or reckless disregard for the truth in applying for a search warrant does not act in good faith.

CONCLUSION

Under F.R.Cr.P. 33, this court has the authority to grant a new tial in the interest of justice. By this application the Defendant GEBRAYEL has demonstrated that justice does require a new trial. Perhaps misguided by its zeal, the government allowed the objective of a conviction blind it to its purpose to see that justice is done. The prosecution overstated, over-embellished and over dramatized the seriousness of the Defendant's conduct and left the firm suggestion that he was participating in some other illegal activity. The Defendant was required to defend innuendo as well as the indictment. As the record now stands the Defendant may well have been convicted because of innuendo and not evidence.

DATED this 13th day of July, 1984.

FRANK J. CREMEN, ESQ.
302 East Carson Avenue,
#1004
Las Vegas, Nevada 89101
Attorney for Defendant
GEBRAYEL

Filed July 30, 1984

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Attorney for Defendant,
GEORGE GEBRAYEL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CR. LV-83-89, LDG
vs.	)	
GEORGE GEBRAYEL, RAFAEL ACOSTA, et al.,	)	
Defendants.	)	

GEBRAYEL'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR NEW TRIAL

In its response to the Defendant GEBRAYEL'S Motion for a New Trial, the

government indulges in the same kind of attack that has marked this prosecution from it inception. Rather than confining itself to the charges made, the government takes out its black crayon and attempts to color GEBRAYEL and everything about him sinister black. Now the court is being told that the government will present evidence that the Defendant set up phony accounts, received loan kick-backs and engaged in extortion activities while a member of the board of directors of the Pan American International Bank. All these charges are nonsense, but none of them have anything to do with the merits of the motion for a new trial.

In his motion for new trail GEBRAYEL stated that the government had accused him of "laundering money" and never offered any proof of that allegation. GEBRAYEL stated that the government

implied and suggested that there was something underhanded going on at the bank, independent of the allegations made in the indictment. Indeed, that implication that the government seeks to make would appear to be the basis for the prosecution in the first instance. However, neither in its lengthy investigation, both pre and post indictment, nor in the trial of this matter was the government able to substantiate the implication that it deliberately made. Indeed, as pointed out, the government did not even offer testimony as to what "laundering money" is.

Regarding the motion to suppress that the government has never responded to on its merits, the government lamely suggests that it was untimely. The court is asked to remember that it was not until a week or two prior to trial that the

government supplied counsel for the Defendants with copies of the statements of Richard Rodriguez. It should also be noted that these statements were ordered to be produced by the government months prior that. Until these statements were provided the Defendants had no basis on which to bring their motion to suppress. As pointed out in Franks v. Delaware, 438 U.S. 154 98 S.Ct. Rptr. 2674 (1978), a motion attacking the truthfulness of the underlining affidavit in support of a search warrant cannot rest upon mere allegations or suspicions. The government suggests that this information could have been obtained by the Defendants in their deposition of Richard Rodriguez. Nothing could be further from the truth. The statement that was taken by counsel for GEBRAYEL of Richard Rodriguez was preliminary in nature. It was intended

by all parties that the statement would continue at a later time. However, due to the efforts of the government, Rodriguez was persuaded not to give any further statements to counsel for the Defendants. Thus, this January 1984 deposition was never completed.

The government also suggests that GEBRAYEL has no standing to bring this motion. That, too, is nonsense. It must be remembered that the government searches, on the occasion of its second search of the ban, the executive offices of the Pan American Bank. These were the offices of GEORGE GEBRAYEL. It has long been settled that a defendant has standing to object to the search of his office. See Gouled v. United States, 255 U.S. 298, 481 S.Ct. 261; United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420. It has even been held that a Defendant

has standing to object to the government's search of an office that he shares with someone else. Mancusi v. DeForti, 392 U.S. 364, 88 S.Ct. 2120.

The government's argument that no evidence was presented at the trial of this matter that was obtained as a result of this issuance of this second search warrant is wishful thinking. Attached hereto as Exhibit "1" is a document receipt prepared by the government and signed by Richard Kruger, after the second search warrant occurred. This, the Defendant GEBRAYEL believes, represents only a portion of the items received by the government as a result of this second search. It is believed that items 5, 6, 11, 12, 14, 19, 23, 24 and 25, were all produced as evidence at the time of the trial of this matter.

CONCLUSION

The government refuses to respond to the allegations that the Defendant GEBRAYEL has made in his motions for new trial and to suppress. The government refuses to address the merits of these motions. Of what is the government afraid? It is submitted that the accusations made in those motions are true and correct. This prosecution has been and will be shown to be one that has been misdirected, misguided and misconceived.

DATED this 30th day of July, 1984.

FRANK J. CREMEN, ESQ.
302 East Carson Avenue, #1004
Las Vegas, Nevada 89101
Attorney for Defendant, GEBRAYEL

DOCUMENT RECEIPT

The following documents were seized on July 13, 1983, pursuant to search warrant number 83-0166M:

1. Signature card and release order - Carlos Sama and Tom Sama.
2. Signature card (Closed) - Carlos Sama.
3. Signature card (Closed) - Emma Wulze.
4. Signature card - Carlos Soto.
5. Signature card - Alberto Bear and Julian Garcia.
6. Signature card (Closed) - Marion Fernandez.
7. One brown folder titled Partout Distributing Inc.
8. Reference card and signature card for Bart C. Sloan.
9. Signature card for Steve Aguirre, Charlene K. Aguire and Bart Sloan.
10. Signature cards for Carlos Sama and Toni Sama.
11. Non Resident Declarations.
12. Thirty four debit and credit memos for J. Garcia regarding repurchase agreements.
13. One Colt Python 357 magnum number E72876, one black leather holster, two speed loader, 18 rounds of ammunition.
14. 18 Currency Transaction reports and one tax forms order status, letter from Flodin.
15. 2 Demand Deposit Accounting forms and one savings accounting new account forms.

16. One microfilm card for June 1983 for account number 5000001693.
17. Seven microfilm cards for 1982 account number 100-0101 through 100-1434.
18. Fifteen microfilm cards dated 1/83 through 6/83 for account numbers 100-0101, 100-2058, 100-1434, 100-2503, 100-2716, 100-1426.
19. Powers of attorney and correspondence for Emma Wulze, Ollie Makdad, Mario Fernandez, Behar.
20. Six rolls of microfilm.
21. Five rolls of microfilm.
22. Six rolls of microfilm.
23. Currency Transaction Reports filed.
24. 1982 and 1983 repurchase agreements and chart of repurchase orders.
25. Stockholder Proxy file of 6-8-83.
26. One blue folder containing miscellaneous Mr. Sheik (sic) F. Amhaz documents.

EXHIBIT "1"

RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing GEBRAYEL'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR NEW TRIAL is hereby acknowledged this 30th day of July, 1984.

U.S. ATTORNEYS OFFICE

DONALD CAMPBELL
Attorney-in-Charge
Las Vegas Task Force